IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, CJ.* and *S. Natarajan, J.*

R. Krishnaswami Reddiar, Chidambara Vilas Motor Service, Thuraiyur, Trichy District .. *Appellant**

v.

The Presiding Officer, Labour Court, Madurai and another .. *Respondents.*

Kadirsa .. *Appellant*

v.

The Management of Mohideen Andavar Motor Service, Jail Road, Pudukottai and another .. *Respondents.*

Sri Sakkubai Transports (P.) Ltd., Trichy-2 represented by its Managing Director .. *Appellants*

v.

The Presiding Officer, Labour Court, Madurai and another .. *Respondents.*

and

The Management of Paramagudi Bus Transport (P.) Ltd., No. 8-131, Madurai-Ramnad Road, Paramagudi, Ramnad District .. *Appellant.*

v.

M. Palaniyandi *alias* **Palaniswami and others** .. *Respondents.*

Payment of Wages Act (*IV of* 1936), *section* 15—*Industrial Disputes Act* (*XIV of* 1947), *sections* 33-*C* (2), 10 (1)—*Scope—Transport Workers—Computation of allowances in terms of money — Not within section* 15 *of the Payment of Wages Act—Competent within section* 33-C (2) *of the Industrial Disputes Act —Status of an employee, not within, section* 33-*C* (2) *of the Industrial Disputes Act—Can be raised as a dispute under section* 10 (1).

No machinery for computing the allowances of a workman in terms of money has been specifically provided for. Section 15 of the Payment of Wages Act cannot be invoked for the purpose, for, its scope in confined to deductions or delay in payment of wages. Such a computation is competent only under section 33-C (2) of the Industrial Disputes Act. [*Paras.* 2 *and* 3.]

Any incidental question which may be brought within the scope of section 33-C (2) of the Industrial Disputes Act will have to be inherently related to the problem of computation. But, status is not one such question just as a defence of dismissal, or retrenchment, which when disputed, could not be decided under section 33-C (2). They are questions which have to be decided by raising industrial disputes under section 10 (1) of the Industrial Disputes Act. [*Para.* 6.]

Cases referred to :—

Laxman v. *Dayalal Meghji and Co.*, (1968) 1 L.L.J. 139: (1967) M.P.L.J. 63: (1967) Jab. L.J. 74: A.I.R. 1967 M.P. 155; *Lakshmi Mills Co., Ltd.* v. *Labour Court*, (1962) 1 L.L.J. 493: (1963) 2 M.L.J. 184: A.I.R. 1962 Mad. 335; *Central Bank of India* v. *Rajagopalan*, (1963) 2 L.L.J. 89: (1964) 3 S.C.R. 140: (1964) 2 S.C.J. 176: A.I.R. 1964 S.C. 743; *Natarajan* v. *Lakshmi Mills Co.*, (1964) 2 L.L.J. 296.

W.A.No. 249 *of* 1970:—Appeals under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Alagiriswami, dated 30th January, 1970 and made in exercise of the Special Jurisdiction of the High Court in Writ Petition No. 3516 of 1969 presented to the High Court under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records connected with the order of the Labour Court, Madurai in I.A. No. 143 of 1969 in Claim Petition No. 466 of 1968, dated 22nd September, 1969 and quash the same.

*W.A. Nos. 249, 290, 336 of 1970 and 95 of 1971. *12th March*, 1975.

W.A.No. 290 *of* 1970:—Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Ismail dated 15th December, 1969 and made in exercise of the Special Jurisdiction of the High Court in Writ Petition No. 2745 of 1969 presented under Article 226 of the Constitution of India to issue a writ of Prohibition directing the second respondent the Presiding Officer, Labour Court, Madurai herein, to forbear from proceeding further with C.P. No. 545 of 1968 on his file.

W.A. No. 336 *of* 1970:—Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Alagiriswami, dated 30th January, 1970 and made in exercise of the Special Jurisdiction of the High Court in W.P. No. 3517 of 1969 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to the order of the Labour Court, Madurai in I.A.No. 366 of 1969 in Claim Petition No. 73 of 1969, dated 22nd September, 1969 and quash the same.

W.A.No. 95 *of* 1971:—Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Palaniswamy, dated 10th November, 1970 and made in exercise of the Special Jurisdiction of the High Court in W.P.No. 2346 of 1969 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in C.P. No. 27 of 1968 on the file of the 8th respondent and quash the order dated 14th May, 1969 and made therein.

P.R. Govindaswamy Ayyar for *V.G. Palaniswamy, A.Ramachandran, Row and Reddy* and *S. Varadarajulu Naidu*, for Appellant.

B. Soundarapandian and *F. Mahboobjan*, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, CJ.—The scope and effect of section 15 of the Payment of Wages Act, 1936 and of section 33-C (2) of the Industrial Disputes Act, 1947, arises for determination in these cases, except in one, where the point is whether the question of status or classification of an employee will also be within the ambit of section 33-C (2). The respondents, who are all transport workers governed by the provisions of the Motor Transport Workers Act, 1961, applied to the Presiding Officer, Labour Court, Madurai, under section 33-C (2) of the Industrial Disputes Act for computation in terms of money certain benefits and allowances they claimed to be entitled to under the Motor Transport Workers Act. They claimed these allowances and benefits as having been in arrears by the employers over a number of years. A preliminary question was raised before the Presiding Officer, Labour Court, by the employers that he had no jurisdiction under that section to compute in terms of money the benefits and allowances claimed, but that the workers should have invoked section 15 of the Payment of Wages Act and asked for relief as in respect of delayed wages. The Presiding Officer, Labour Court, repelled this contention and sustained his jurisdiction. This was also the case in Writ Appeal No. 290 of 1970. But the appellant there is a workman who is aggrieved by the finding of Ismail, J., that whether he belonged to the category of a clerk or an attender was a question not within the purview of section 33-C (2) of the Industrial Disputes Act. On that view, the learned Judge allowed the petition out of which this appeal arises and that is how the workman is before us in that appeal.

2. The Payment of Wages Act, 1936, was enacted to regulate the payment of wages to certain classes of persons employed in industry. Wages are defined in that Act to cover all remuneration, whether by way of salary, allowances or otherwise, expressed in terms of money or capable of being so expressed, which would be payable to a person employed in respect of his employment or of work done in such employment. The definition includes many other sources of remuneration, but excludes a certain variety of remuneration as for instance, bonus, the value of any house accommodation, travelling allowance and so on. Section 5 of that Act prescribes the time of payment of wages and the next section as to how wages should be paid, that is to say, in

current coin or currency notes or in both. Section 7 provides how and in what cases deductions from wages are permissible. Section 8 provides for fines. Sections 9 to 13 also deal with deductions from wages. We have then section 15 which provides for appointment of a Presiding Officer of a Labour Court or an Industrial Tribunal constituted under the Industrial Disputes Act, 1947, or under any corresponding law, to be the authority to hear and decide for any specified area "all claims arising out of deductions from the wages, or delay in payment of the wages, of persons employed or paid in that area, including all matters incidental to such claims." The jurisdiction thus afforded to the officer appointed under this section will extend to (1) all claims arising out of deductions from the wages and (2) delay in payment of wages. But an application for these two reliefs should be made within the time prescribed by the proviso to sub-section (2) of section 15. These two reliefs, in order to ascertain their respective scope, will have to be determined in the light of the provisions we have referred to relating to the item for payment of wages and permissible deductions from wages. An appeal against an order dismissing either wholly or in part an application made under section 15 (2) is provided for by section 17. Section 17 (*a*) provides for enforcement of the order made under section 15 (2). Section 20 makes any contravention of the provisions stated therein an offence punishable with fine. The procedure for trial of such offences has also been laid down by the Act and then there is a bar of a suit in any Court of law for recovery of wages or any deduction from wages in certain circumstances. We may mention that to transport workers, the Payment of Wages Act has been made applicable. Having regard to all these provisions, it seems to us that the scope of section 15 is very limited and is circumscribed by the various provisions of the Act we have referred to. The scope, as we consider, is confined to only claims arising out of deductions from wages or delay in payment of wages and an application under section 15 (2) has to be made within the time prescribed. In an application under section 15 (2), what the officer concerned would be called upon to determine is whether, in the case of a claim for deduction, such deduction would be permissible under one or the other provisions of the Act and in the case of a claim for delayed wages, he would have to find whether the claimant for wages is entitled to the claim and whether the payment thereof was delayed in the context of the provision prescribing the time for payment of wages. It is true that wages, as defined in the Act, include wages expressed in terms of money, or capable of being so expressed. But where wages have not been expressed in terms of money, but are capable of being so expressed as in the case of allowance, it appears to us that no machinery for computing the allowances in terms of money has been specifically provided for. In our opinion, section 15 of the Payment of Wages Act cannot be invoked for the purpose, for, its scope is confined to deductions or delay in payment of wages. Under the guise of delay in payment of wages, it does not appear to us that the officer functioning under section 15 can be called upon to ascertain the money-value of allowances. That, as we consider, is not incidental to the question of delay in payment of wages.

3. On that view of the matter, we consider that such a computation is competent only under section 33-C (2) of the Industrial Disputes Act. That provision is wide enough to cover that relief and, in our opinion, there is nothing in common between the scope of section 15 of the Payment of Wages Act and that of section 33-C (2) of the Industrial Disputes Act. Where jurisdiction is concurrent under different provisions in different enactments and the jurisdiction under one of those provisions is general and is of a larger scope, it may be possible to take the view that the general and wider jurisdiction should yield place to the special jurisdiction and that only after exhausting the latter, the general jurisdiction can be resorted. Equally, it may be said that, since the jurisdiction is concurrent, there is no legal bar to the wider jurisdiction being invoked without resorting to the special jurisdiction. But this aspect of the matter does not arise for our consideration in these cases, as we are of opinion that the scope

of section 15 of the Payment of Wages Act and that of section 33-C (2) of the Industrial Disputes Act are not concurrent, but different the former being confined only to the two limited reliefs, which we have indicated. On that view, it would follow that Ismail, J., came to the correct conclusion.

4. Our attention has, however, been invited to some of the decided cases, which we shall briefly notice. For the appellants, reference has been made to *Laxman* v. *Dayalal Meghji and Co.*[1], and *Lakshmi Mills Co., Ltd.* v. *Labour Court*[2], decided by one of us. The first of them held that the Labour Court had no jurisdiction to entertain an application under section 33-C (2) of the Industrial Disputes Act for recovery of the difference in wages actually paid and the wages payable under the Madhya Pradesh Minimum Wages Fixation Act, 1962. A Division Bench there was of opinion that there was no indication whatever either in section 33-C (2) of the Industrial Disputes Act, or in section 15 of the Payment of Wages Act, or in the Supreme Court decision in *Central Bank of India* v. *Rajagopalan*[3], that the scope of section 33-C (2) was wide enough to include claims under sections 2 (*vi*) and 15 of the Payment of Wages Act. But this view of the Madhya Pradesh High Court was based on its construction of sub-section (1) of section 33-C of the Industrial Disputes Act and in the light of it, of the scope of sub-section (2) of that section. Though *Lakshmi Mills Co. Ltd.* v. *Labour Court*[2], took somewhat such view, we do not think that, that view can be sustained in view of the later decisions of the Supreme Court, as for instance in *Central Bank of India* v. *Rajagopalan*[3]. There the Supreme Court specifically held that since sub-section (2) of section 33-C has not repeated the words of limitation in sub-section (1) the scope of sub-section (2) must be held to be wider than that of sub-section (1).

1. (1967) M.P.L.J. 63 : (1967) Jab.L.J. 74 : (1968) 1 L.L.J. 139 : A.I.R. 1967 M.P. 155.
2. (1962) 1 L.L.J. 493: (1963) 2 M.L.J. 184: A.I.R. 1962 Mad. 335.
3. (1963) 2 L.L.J. 89 : (1964) 3 S.C.R. 140 : (1964) 2 S.C.J. 176 : A.I.R. 1964 S.C. 743.

5. On the above view of the matter, we are inclined to think that since the jurisdiction under section 33-C (2) of the Industrial Disputes Act is not concurrent, but they are different in their nature and scope, it was competent for the Presiding Officer, Labour Court, to entertain the applications for computation of the allowances in terms of money and proceed under sub-section (2) of that section. Accordingly, Writ Appeals Nos. 249 and 336 of 1970 as well as Writ Appeal No. 95 of 1971 are dismissed, but with no costs. We may record that so far as respondents 1, 4 and 5 in Writ Appeal No. 95 of 1971, are concerned, they do not press their claim.

6. As we mentioned, in Writ Appeal No. 290 of 1970, the question is whether, wide as the scope of sub-section (2) of section 33-C may appear to be, it will extend to a determination of the question of categorisation or status of the workman under the pretext of computing in terms of money-allowances claimed by the workmen. On that question, Mr. Ramachandran, for the appellant relies on *Central Bank of India* v. *Rajagopalan*[1]. In our opinion that was a case in which the right to allowances was disputed as a defence and the Supreme Court held that it was competent for the Labour Court to decide it as a question incidental to the computation. We do not think that this decision is authority for the proposition that for deciding the question of status or categorisation of employees, the power under section 33-C (2) can be invoked. Ismail, J., relied on *Lakshmi Mills Co. Ltd.* v. *Labour Court*[2], which was decided by one of us and which was upheld in appeal in *Natarajan* v. *Lakshmi Mills Co.*[3]. The question of status of an employee was involved in that case and it was held that that was not within the scope of section 33-C (2). We are of opinion that any incidental question which may be brought within the scope of section 33-C (2) will have to be inherently related to the problem of computation.

1. (1963) 2 L.L.J. 89 : (1964) 2 S.C.J. 176 : (1964) 3 S.C.R. 140 : A.I.R. 1964 S.C. 743.
2. (1962) 1 L.L.J. 493: (1963) 2 M.L.J. 184: A.I.R. 1962 Mad. 335.
3. (1964) 2 L.L.J. 296.

But status is not one such question just as a defence of dismissal or retrenchment, which when disputed, could not be decided under section 33-C (2). They are questions which have to be decided by raising industrial disputes under section 10 (1) of the Industrial Disputes Act. Accordingly we dismiss Writ Appeal No. 290 of 1970. No costs.

S.J. — *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

Thomas .. *Appellant**

v.

Victor .. *Respondent.*

(A) *Mortgage—Suit for redemption—Mortgage of* 1076 (*M.E.*)—*Purakadam in* 1093 (*M.E.*) *in favour of mortgagee's sons, he having died—Possession under mortgage to be on basis of purakadam also—Subsequent mortgage by mortgagor's representatives to first defendant—Direction to redeem earlier mortgages—First defendant redeeming from* 2 *out of* 5 *sons of original mortgagee—Plaintiff suing to redeem original mortgage—Suit, if barred by limitation.*

(B) *Travancore-Cochin Regulation* (VI *of* 1100 *ME*), *section* 20.

(C) *Part B States* (*Laws*) *Act,* 1951.

(D) *Limitation Acts of* 1908 *and* 1963.

The suit property was mortgaged on 3-2-1076 (M.E.) in favour of P. The latter died leaving five sons. On 7-4-1093 (M.E.) a purakadam was executed in favour of four of the sons of *P* of the same property. The purakadam stated *inter alia* that the possession under the mortgage was to be on the basis of the purakadam also. On 10-4-1107 (M.E.), the mortgagor's representatives—father of plaintiff and father of defendants 2 and 3—executed a mortgage in favour of the first defendant directing redemption of the earlier mortgages. The first defendant redeemed from two of the sons only of the original mortgagee and got into possession of the suit property as mortgagee. In 1966, the plaintiff sued for redemption of the mortgages of 1076 (M.E.) and 1093 (M.E.). The first defendant contended that the suit was time-barred.

Held: In view of the recitals in the purakadam that the possession under the mortgages was to be on the basis of that deed also, the mortgagors ought to consolidate both the mortgages of 1076 (M.E.) and 1093 (M.E.); together and piecemeal redemption was impossible in this case as per the law corresponding to the Transfer of Property Act before it was amended in 1929. The right to consolidation was a vested right. Since a separate redemption of the mortgage of M.E. 1076 alone is not possible, the present suit for redemption thereof is not barred[*Paras.* 12 *and* 18.]

Cases referred to:—

Syed Yousuf v. *Syed Mohammed*, (1967) 2 S.C.R. 318: (1967) 2 S.C.J. 244: (1967) 2 An.W.R. (S.C.) 58: (1967) 2 M.L.J. (S.C.) 58: A.I.R. 1967 S.C. 1318; *Nachappa Goundan* v. *Samiappa Goundan*, (1946) 2 M.L.J. 35: 230 I.C. 387: A.I.R. 1947 Mad. 18; *Bhaskaran Moothathu* v. *Agnisaramaru Nambori*, (1946) T.L.R. 546; *Pakavathi Neelakantan* v. *Ummini Pillai*, 1952 K.L.T. 129: A.I.R. 1952 T.C. 295; *Mohammad Akbar Khan* v. *Musammat Motai*, (1947) 74 I.A. 285: (1948) 1 M.L.J. 130: 61 L.W. 76: A.I.R. 1948 P.C. 36; *Lala Soni Ram* v. *Kanhaiya Lal*, (1913) 40 I.A. 74: I.L.R. 35 All. 227.

Appeal against the decree of the District Court, Kanyakumari at Nagercoil in Appeal Suit No. 244 of 1963 preferred against the decree of the Court of the District Munsif of Padmanabhapuram in Original Suit No. 471 of 1966.

P. Ananthakrishnan Nair, for Appellant.

S. Padmanabhan, for Respondent.

The Court delivered the following

JUDGMENT.—The 8th defendant is the appellant in the second appeal. The short facts are as follows:—

2. The father of the plaintiff, Vedamani Nadar was the owner of 28 cents, while

*S.A. No. 582 of 1970. 19th September, 1975.

the father of defendants 2 and 3 was the owner of another 22 cents. Both of them jointly executed a mortgage deed under Exhibit A-5, dated 10-4-1107 (M.E.) in favour of the first defendant. In Exhibit A-5, it was undertaken to deal with the prior mortgage Exhibit A-1, dated 3-2-1076 (M.E.), which prior mortgage was executed by the predecessors in title of the mortgagor's principal under Exhibit A-5 in favour of one Poruthiyudayan. The mortgagee Poruthiyudayan, died leaving behind 5 sons. On 7-4-1093 (M.E.), under Exhibit A-2, the mortgagor executed a *purakadam* deed in favour of the 4 sons of Poruthiyudayan. It is only after these transactions that the mortgagors executed Exhibit A-5 directing the redemption of the prior mortgages under Exhibits A-1 and A-2. The first defendant paid 2,400 fanams, towards the discharge of these deeds. Out of the mortgage amounts, the plaintiff's father being the owner of 28 cents, received 1,300 fanams and defendants 2 and 3 together, received 1,200 fanams being the owners of 27 cents. As per the mortgage, the first defendant is in possession and enjoyment of the suit property as mortgagee.

3. While so, Vedamani Nadar, the father of the plaintiff partitioned his property by Exhibit A-7, dated 5th October, 1933, by which the 28 cents fell to the share of the plaintiff. By the deeds dated 6-10-1105 and 23-2-1109 (M.E.) the mortgage dated 3-2-1066 (M.E.), is acknowledged and hence the mortgage is not barred by limitation. Under these circumstances, the suit is filed for redemption.

4. In the written statement of the first defendant, it is contended that the mortgage deed recites to redeem the prior mortgages Exhibits A-1 and A-2. The first defendant has redeemed from only 2 of the 5 sons. Therefore, the other three sons of the original mortgagee ought to have been impleaded. In any event, without paying the mortgage, there cannot be any redemption by the plaintiff.

5. On similar lines, the other defendants also filed written statements, It was mainly contended that the rights of redemption had become barred.

6. The learned trial Munsif, on a consideration of the oral and documentary evidence passed a preliminary decree for redemption. On appeal, in A.S.No. 244 of 1958, the said finding of the trial Court, was confirmed by the learned District Judge of Kanyakumari. Hence, the present second appeal.

7. The only point that arises for my determination is, as to whether the suit is barred by limitation.

8. Mr. Ganapathi Subramania Iyer, learned counsel for the appellant, strenuously contends before me that upon the execution of the *purakadam*, section 20 of the Travancore Regulation VI of 1100 (M.E.) gets attracted, as a result of which the limitation of 50 years will have to be computed from the date of the *purakadam*. In 1951 the Part-B States (Laws) Act, 1951 came into force and extended the Indian Limitation Act, 1908, to Travancore, the result of which would be that within two years since the coming into force of Part-B States (Laws) Act, 1951, the suit ought to have been filed. In so far as it has not been done, the present suit for redemption is barred. In support of this submission the learned counsel relied on *Syed Yousuf* v. *Syed Mohammed*[1].

9. These submissions are countered by Mr. S. Padmanabhan by contending as follows: (*a*) the recitals of Exhibit A-2 are to the effect that the mortgagee's possession will be on the basis of Exhibit A-2, Such being the position, it was not open to the mortgagor to redeem the mortgage piecemeal. Therefore even without reference to the Travancore-Cochin Limitation Act, if the period of 50 years of limitation is reckoned from Exhibit A-1 of the year 1076 (M.E.) (1918), it is well open to the mortgagors to redeem the property. (*b*) Though the provisions of the Transfer of Property Act were not made applicable directly to Travancore-Cochin, the

1. (1967) 2 S.C.R. 318 : (1967) 2 S.C.J. 244 : (1967) 2 An.W.R. (S.C.) 58 : (1967) 2 M.L.J. (S.C.) 58 : A.I.R. 1967 S.C. 1318.

principles adumbrated, therein were made applicable to Travancore-Cochin: One such provision was section 61, as it stood prior to the Amending Act II of 1929, under which the mortgagor was in duty bound to consolidate all the mortgages. If, therefore, a separate redemption of Exhibit A-1 was not possible, it cannot be contended that the right of redemption had become barred. (c) In any event before the expiry of the period of limitation, the new Limitation Act of 1963 had come into force, and therefore, it cannot be contended that the suit ought to have been filed within 2 years after the passing of Part-B States (Laws) Act, 1951. In support of these submissions, the learned counsel relies on *Nachappa Goundan* v. *Samiappa Goundan*[1], *Bhaskaran Moothathu* v. *Agnisaramaru Namboori*[2], *Pakavathi Neelakantan* v. *Ummini Pillai*[3] and *Mohammed Akbar Khan* v. *Mussammat Motai*[4].

10. In reply, Mr. Ganapathi Subramania Iyer, learned counsel for the appellant says that the execution of *purakadam* does not give an extended period of limitation and once limitation started running it cannot be arrested.

11. Undoubtedly, by the execution of *purakadam* under Exhibit A-2, section 20 of Travancore Regulation No. VI of 1100 will be applicable. That categorically states that the period of limitation has to be reckoned from the date of such *purakadam* and the said period is 50 years. On 1st April, the Part-B States (Laws) Act of 1951 came into force and extended the Limitation Act, 1908, to Travancore-Cochin. The result was that the Travancore Regulation VI of 1100 stood repealed by section 30 of the Indian Act. On this basis, it is contended that there is no period of limitation prescribed for a *purakadam* under the Indian Limitation Act of 1908, and consequently, the suit ought have been filed within 2 years *viz.*, by 1953. Therefore, the present suit filed in 1966 is hopelessly barred by limitation:

1. (1946) 2 M.L.J. 35 : 230 I.C. 387 : A.I.R. 1947 Mad. 18.
2. (1946) T.L.R. 546.
3. (1952) K.L.T. 129 : A.I.R. 1952 T.C. 295.
4. (1947) 74 I.A. 285 : (1948) 1 M.L.J. 130 : 61 L.W. 76 : A.I.R. 1948 P.C. 36.

In advancing this contention, the following passage in *Syed Yousuf* v. *Syed Mohammed*[1], is pressed into service:

> "*Ex facie*, section 30 applied to a suit for which the period of limitation prescribed by the Indian Limitation Act, 1908 is shorter than the period of limitation prescribed by the corresponding law in force in the Part B State. Now, the Hyderabad Limitation Act did not apply to a suit for recovery of possession of a wakf property. The result was that under the corresponding law in force in Hyderabad, there was no limitation for such a suit. In other words, the period of limitation prescribed for the suit by the corresponding law in Hyderabad was an unlimited period. Article 142 of the Indian Limitation Act, 1908 applied to a suit for recovery of possession of the wakf property. As it prescribes a shorter period of limitation for the institution of the suit, section 30 enabled the plaintiffs to institute the suit within a period of two years after 1st April, 1951. The Part B States (Laws) Act, 1951 while extending the Indian Limitation Act, 1908 to Hyderabad thus allowed the plaintiffs reasonable time to institute the suit for recovery of the property. The extension of the Indian Limitation Act, 1908 to Hyderabad and the consequential change in law prescribing a shorter priod limitation did not confiscate the existing cause of actionand must be regarded as an alteration in the law of procedure for its enforcement. We must, therefore, apply the normal rules that the law of limitation applicable to the suit is the law in force at the date of the institution of the suit. The suit is, therefore, governed by the Indian Limitation Act, 1908.

12. Though these observations seem to support the contention of the learned counsel for the appellant, to a great extent, in making these submissions, he ignores the recitals occurring in Exhibit A-2, since thereunder it is stated that the possession under the mortgage deed shall be on the basis of Exhibit A-2 also. Under these circumstances, the mortga-

1. (1967) 2 S.C.R. 318 : (1967) 2 S.C.J. 244.

gors ought to consolidate both the mortgages and redeem Exhibit A-1 and A-2 together and piecemeal redemption was impossible, as per the law under the Transfer of Property Act that stood prior to the Amending Act II of 1929. This right of consolidation was not a mere right to have the advantage of an existing statute, but it was a vested right in the property. This is the dictum laid down in *Nachappa Goundan* v. *Samiappa Goundan*[1].

13. No doubt, the Transfer of Property Act as such, did not apply to Travancore-Cochin, then. But the principles enunciated therein were made applicable. It was held in *Bhaskaran Moothathu* v. *Agnisaramaru Namboori*[2], that all the mortgages over the same property in favour of one and the same person must be simultaneously redeemed. It was further held that the right of redemption involves the obligation to discharge all the debts due to the partiuclar creditor, as against whom redemption is sought.

14. Again in *Pakavathi Neelakantan* v. *Ummini Pillai*[3], it was held :

> "Notwithstanding the fact that the Transfer of Property Act was not law in Travancore and Cochin before its introduction there, the principle which section 61 (before its amendment in 1929) impliedly recognised was applicable to Tranvancore and Cochin and all the mortgages over the same property in favour of one and the same person must be simultaneously redeemed, and the mortgagor is not entitled to redeem one without redeeming the other or others."

15. The above rulings full support the stand of Mr. Padmanabhan, learned counsel for the respondent.

16. *Lala Soni Ram* v. *Kanhaiya Lal*[4], was a case wherein the question arose whether by reason of acknowledgment by deeds of 1866 and 1867, the limitation could be extended. It was held that it was not so extended, since those acknowledgments were not made by a person through whom the defendants claimed title, and therefore, the statutory time continued to run during the period between 1883 and 1898. This case is clearly distinguishable.

17. To my mind, it appears that the recitals in Exhibit A-2, to which I have made a reference earlier, are of great consequence and of immense value in deciding the point of limitation. The fallacy in the argument of Mr. Ganapathi Subramania Iyer is, that he wants to reckon the 50 year period of limitation from the date of the *purakadam*, Exhibit A-2 without reference to the recitals contained therein.

18. Thus, I am in entire agreement with the findings of the Courts below. Consequently, I hold that there are no merits in the second appeal and the same shall stand dismissed. In the circumstances of the case, I make no orders as to costs. No leave.

R.S. —— *Appeal dismissed.*

1. (1946) 2 M.L.J. 35 : 230 I.C. 387 : A.I.R 1947 Mad. 18.
2. (1946) T.L.R. 546.
3. (1952) K.L.T. 129 : A.I.R. 1952 T.C. 295.
4. (1913) 40 I.A. 74 : I.L.R. 35 All. 227.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*G. Ramanujam, J.*

The Burmah Shell Oil Storage and Distributing Company of India Ltd., Indian Bank Buildings, Madras-1. .. *Petitioners**

v.

The Government of Tamil Nadu represented by the Chief Secretary to Government, Fort St. George, Madras-9 and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947), sections 10 (1), 12—Industrial disputes—Management also can raise—Management can approach Concilation Officer under section 12 (1).

Having regard to the object of the Industrial Disputes Act of preventing industrial unrest and of providing for a mode of settlement of industrial disputes and the wide language contained in section 10 (1) of the Act, a management company can also

* W.P. Nos. 4992 and 4993 of 1975.

12th *December*, 1975.

raise an industrial dispute which may properly form the subject-matter of a reference under section 10 (1) [*Para.* 10.]

Section 12 does not suggest that the conciliation should be sought only by the workmen and not by the management. The company can also approach the Conciliation Officer under section 12 (1) if there is a dis-agreement between the management and the workmen on certain vital matters which are likely to affect industrial peace and to create industrial unrest and also for reference under section 10 (1) if such conciliation fails. [*Para.* 12.]

Cases referred to :—

Crown Aluminium Works v. *Their Workmen*, (1958) 1 L.L.J. 1 : (1958) M.L.J. (Crl.) 109 : (1958) S.C.R. 651 : 1958 S.C.J. 209 : A.I.R. 1958 S.C. 30 ; *Mill Owners' Association* v. *Labour*, (1966) 1 L.L.J. 1 : (1967) 1 S.C.J. 360 : (1966) 1 S.C.R. 382: A.I.R. 1966 S.C. 497.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of (1) *Certiorari* calling for the records in G.O. Rt. No.1327 Department of Labour and Employment dated 19th June, 1975 and quash the said G.O. Rt. No. 1327 dated 14th June, 1975 passed by the 1st respondent (W.P.No. 4992 of 1975) and (2) *Mandamus* directing the first respondent, Government of Tamil Nadu to refer specifically four demands raised by the petitioner company *viz* (1) Dearness Allowance (2) Rationalisation of Pay Roll (3) Rationalisation of Duty Allowance for Clerks at Tondiarpet installation and (4) Retirement age along with the demands of the third respondent-union in the I.D. No. 44 of 1975 Industrial Tribunal, Madras respectively.

P.K. Kurian of Messrs. King and Patridge, for Petitioners.

T. Sathiadev, Assistant Government Pleader, for 1st Respondent.

S. Ramaswamy and *R. Sanjay Mohan*, for 3rd Respondent.

The Court made the following

ORDER.—Since both the above writ petitions filed by the same petitioner against the same respondent arise out of the same facts, they are dealt with together.

2. Certain disputes arose between the petitioner-company and the third respondent-union arising out of a chapter of 48 demands raised by the union. The concerned Labour Officer held conciliation and sent a failure report on 21st December 1974 to the first respondent. The first respondent by G.O. Rt. No. 1327 dated 19th June, 1975 referred 10 of the demands for adjudication by the Industrial Tribunal and in G.O. Rt. No. 1328, dated 19th June, 1975, declined adjudication on other demands raised by the union. Out of the ten demands referred, four related to revision of (1) dearness allowance, (2) pay scales, (3) duty allowance and (4) retirement age. The company had raised a counter demand in respect of these demands that there should be a reduction instead of enhancement as claimed by the workmen. Since these counter demands made by the company had not been referred for adjudication along with the relevant demands made by the workmen, the company has challenged the validity of the first G.O. in W.P. No. 4992 of 1975 referring the ten demands of the union for adjudication on the ground that their allied demands should have also been referred to. The company also seeks a writ of *mandamus* from this court in W.P. No. 4993 of 1975 to direct the first respondent to refer its counter demands to the Tribunal to be adjudicated upon, along with the demands already referred to in the first G.O.

3. A perusal of the said G.Os. shows that the first respondent did not at all consider the counter demands of the company in relation to the said 4 matters. In the said G.Os. the first respondent has not said anything in relation to the same as to whether they are referred or not. It is seen that from the beginning the company has been insisting that its counter demands in relation to the said four matters have also to be considered along with the relevant demands of the union and that, the demands of the union cannot be adjudicated upon without reference to the claims of the company in respect of those four matters.

4. The learned counsel for the petitioner contends that the first respondent has erroneously proceeded on the basis that the management cannot raise an industrial dispute and that a reference to the Industrial Tribunal cannot be made at its instance, and that it is well-established by now that a reference can be made even at the instance of the management. The learned counsel refers to the decisions in *Crown Aluminium Works* v. *Their Workmen*[1] and *Mill Owners' Association* v. *Labour*[2], in support of his plea that there can be a reference under section 10 (1) (*c*) of the Industrial Disputes Act at the instance of the management. In *Crown Aluminium Works* v. *Their Workmen*[1], certain changes in the working hours, bonus, etc., proposed by the management as economy measures were opposed by the union as being prejudicial to them. This dispute was ultimately referred to the Industrial Tribunal. Before the Tribunal the management contended that as economy measures they are entitled to revise the wage structure to the prejudice of the workmen. It was heldby the Tribunal that the payments sought to be cut down by the management were purely concessional payments and that therefore, the workmen had no right to claim them as constituents of their wage structure. On appeal, the Labour Appellate Trbunal held that the so-called concessional payments have been enjoyed by the workmen for a pretty long time as of right and as part of their basic wages and dearness allowance and as such they have become a term of the conditions of service, that it has been the convention with Industrial Tribunals not to reduce the existing emoluments of workmen to their prejudice and that therefore, the changes proposed could not be allowed. When the matter came before the Supreme Court, the management contended that the Labour Appellate Tribunal was in error in assuming that it has been the convention with Industrial Tribunals not to reduce the emoluments of the workmen to their prejudice under any circumstances and that just as a rise in the cost of living index and some other factors may justify revision in wage structure in favour of the workmen so should the revision of the wage structure be permissible in favour of the employer in case the financial position of the employer had considerably deteriorated or other relevant factors indicate such as revision. The Supreme Court accepted the said contention and observed :

"We do not think it would be correct to say that in no conceivable circumstances can the wage structure be revised to the prejudice of workmen. When we make this observation, we must add that even theoretically no wage structure can or should be revised to the prejudice of workmen if the structure in question falls in the category of the bare subsistence or the minimum wage. If the wage structure in question falls in a higher category, then it would be open to the employer to claim its revision even to the prejudice of the workmen provided a case for such revision is made out on the merits to the satisfaction of the Tribunal."

In *Mill Owners' Association* v. *Labour*[1], The Supreme Court while laying down certain principles to be followed in fixing the wage structure of industrial employees expressed the view that though the claim of the employees for a fair and higher wage is undoubtedly based on the concept of social justice, industrial adjudication must take into account the problem of additional burden which such wage structure would impose upon the employer and consider whether the employer can reasonably be called upon to bear such burden, that the task of constructing a wage structure must be tackled on the basis that such wage structure should not be changed from time to time, that in dealing with such a problem which is difficult and delicate the financial position of the employer, the future prospects of the industry and the additional burden which may be on the consumer must all be carefully examined. A broad and overall view of the financial position of the employer, the natural and

1. (1958) 1 L.L.J. 1 : (1958) M.L.J. (Crl). 109 : (1958) S.C.R. 651 : 1958 S.C.J. 209 : A.I.R. 1958 S.C. 30.

2. (1966) 1 L.L.J. 1 : (1966) 1 S.C.R. 382 : (1967) 1 S.C.J. 360 : A.I.R. 1966 S.C. 497.

1. (1966) 1 L.L.J. 1 : (1966) 1 S.C.R. 382 : (1967) 1 S.C.J. 360 : A.I.R. 1966 S.C. 497.

just claims of the employees for a fair wage and the capacity of the employer to pay it should all be taken into account, and in determining such a capacity, allowance must be made for a legitimate desire of the employer to make a reasonable profit. One other aspect which the Supreme Court has touched upon is this :

> " The other aspect of the matter which cannot be ignored is that if a fair wage structure is constructed by industrial adjudication, and in the course of time, experience shows that the employer cannot bear the burden of such wage structure, industrial adjudication can, and in a proper case should, revise the wage structure, though such revision may result in the reduction of the wages paid to the employees. It is true that normally, once a wage structure is fixed, employees are reluctant ot face a reduction in the context of their wage pocket ; but like all major problems associated with industrial adjudication, the decision of this problem must also be based on the major consideration that the conflicting claims of labour and capital must be harmonized on a reasonable basis ; and so, if it appears that the employer cannot really bear the burden of the increasing wage bill, industrial adjudication, on principle, cannot refuse to examine the employer's case and should not hesitate to give him relief if it is satisfied that if such earlier relief is not given, the employer may have to close down his business. It is unlikely that such situation would frequently arise, but, on principle, if such situations arise, a claim by the employer for the reduction of the wage structure cannot be rejected summarily."

Relying on the above decisions of the Supreme Court, the learned counsel for the petitioner contends that the managements also are entitled to demand a downward revision of the wage structure if the circumstances, existed for such a revision. The company has demanded in answer to the union's charter of demands for (1) reduction of the high rate of dearness allowance, (2) rationalisation of pay roll, (3) rationalisation of duty allowance and (4) reduction in retirement age. It is urged by the counsel that the reference to the Tribunal of the demands made by the workmen without referring the demands made by the company for reduction of the existing wage structure etc., is not, in law, justified. It is also pointed out that the Government have acted without jurisdiction in referring only the demands made by the workmen for upward revision of the wage structure etc., without reference to the petitioner's demands for modification of the existing wage structure to the prejudice of the workmen.

5. As regards dearness allowance, the union's demand is that it should be paid on the cost of living index of the pre-month on certain rates and the company's case is that the rate of escalation of dearness allowance should be reduced and that a ceiling on dearness allowance should be fixed. On the question of rationalisation of pay roll the union's demand is for an upward revision of the scheme of dearness allowance. But the company had insisted for introduction of a quarterly review of dearness allowance instead of the existing monthly revision. As regards the rationalisation of duty allowance, while the union asked for an upward revision of the duty allowance and for payment of duty allowance to clerks working in the said instalslation, the company claimed that there if no justification for the upward revision o, the duty allowance and that in any event duty allowance will not be paid for those days on which a clerk is absent from work on account of leave or for any other reason, and that it will be paid only for the actual days worked. As regards the retirement age, the union demanded the existing retirement age should be raised, while the company wanted to reduce the same.

6. It is the case of the company that as the Government referred specifically the four demands made by the workmen among others, the Tribunal can either reject the claim of the union or allow the same either in part or in their entirety, that having regard to the order of reference made by the Government, the Tribunal cannot go into the claim of the company that there should be a downward revision in relation to the four matters, unless the counter demands made by the company are also referred to.

7. In the counter-affidavit filed, the first respondent has stated that all the four issues raised by the company have been

taken into account while referring the relevant demands of the union to the Tribunal for adjudication in G.O. Rt. No.1327 dated 19th June, 1975, that having regard to the fact that the issues already referred are wide enough to cover the company's claims, the company can agitate its claims before the Tribunal without another separate order of reference and that, there is no need to refer to and deal with the claims of the company as if they were separate and independent demands dissociated from the demands made by the union. It is said that in any event if the company feels that its claims have not been covered by the reference already made, it can invoke section 9-A of the Industrial Disputes Act and that would result in an industrial dispute. Thus the stand taken by the Government in the counter-affidavit is that where a dispute has arisen on certain demands raised by the workmen, the company cannot expect the Government to pass separate orders of reference on the issues raised by it.

8. The stand taken by the union, is that the first respondent was justified in not making a separate reference on the claims made by the company, that the dispute already referred to the Tribunal will cover its claims as well, and that in any event there cannot be a reference to the Industrial Tribunal under section 10 (1) at the instance of the company.

9. On these rival contentions, the two questions that arise for consideration are (1) whether there could be a reference under section 10(1) of the Industrial Disputes Act at the instance of a management, and (2) whether on the reference already made, the management can plead and seek adjudication by the Tribunal on its claims that there should be a downward revision of (1) dearness allowance, (2) the pay structure, (3) duty allowance, and, (4) retirement age.

10. As regards the first question, it is true as pointed out by Mr. Ramaswami, learned counsel for the union, there has been so far no reference made to the Tribunals or Labour Court under section 10 (1) (*c*) or (*d*) at the instance of the management under section 10 (1) (*c*) or (*d*) and that it is always the union of workmen who had raised industrial disputes and moved the Government for reference to a Tribunal for adjudication of the said disputes. But that circumstance in my view cannot govern the interpretation of the provision in section 10 (1) of the Industrial Disputes Act. The relevant portion of section 10 (1) is set out below :

> " 10. *Reference of disputes to Boards, Courts or Tribunals.*—(1) Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing :—
>
> (*a*) ....
>
> (*b*) ....
>
> (*c*) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication ; or
>
> (*d*) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the second Schedule or the Third Schedule, to a Tribunal for adjudication. "

The above section does not indicate that the Government can make a reference to the Labour Court or to the Tribunal of a dispute only at the instance of the workmen. The language of section 10 (1) seems to suggest that whenever the Government is of opinion that any industrial dispute exists or is apprehended, it may refer the dispute. It may be, in most of the cases the disputes arise by the workmen making certain demands on the management and the management resisting the same. But it is possible that the management wants to modify the existing conditions of service by reducing the salary and allowances payable to them or by increasing the workload and working hours or the reduction of holidays etc., and when the workers resist the same, the management may seek a reference without unilaterally bringing about the changes or giving effect to the proposed modification. I am not inclined to agree with the contention of the union that the only way open to the management in such a contingency is to unilaterally give effect to the proposed modification of the conditions of service leaving it open to the union to take up the

issue and seek a reference on the proposed revision. Acceptance of such a contention will mean that the management should create an industrial unrest by unilaterally modifying the conditions of service to the prejudice of the workmen so as to enable the union to seek a conciliation and thereafter a reference on the question of the management's unilateral modification of the conditions of service. Having regard to the object of the Industrial Disputes Act of preventing industrial unrest and of providing for a mode of settlement of the industrial disputes and the wide language contained in section 10 (1) the management, in my view, can also raise an industrial dispute which may properly form the subject-matter of a reference under section 10 (1).

11. Section 12 dealing with the duties of Conciliation Officers also suggests that an industrial dispute may also be raised by the management. Section 12 (1) says that where an industrial dispute exists or is apprehended the Conciliation Officer must hold conciliation proceedings in the prescribed manner. Secfion 12 (2) states that for the purpose of bringing about a settlement of such a dispute the Conciliation Officer has to investigate the dispute, do all things necessary for the purpose of inducing the parties for coming to a fair and amicable settlement of the dispute. If a settlement is arrived at by the parties before the Conciliation Officer Section 12 (3) enjoins him to send a report to the Government along with a memorandum of the settlement signed by the parties to the dispute. Sub-section (4) of section 12 says that if no such settlement is arrived at, the Conciliation Officer shall send a report setting out the reasons as to why a settlement could not be arrived at. Sub-section (5) provides that on a consideration of the report sent by the Conciliation Officer, the Government has to consider the question of reference to a Labour Court or to a Tribunal. Thus, section 12 does not suggest that the conciliation should be sought for only by the workmen and not by the management. Perhaps it is because of the wide language used in sections 10(1) and 12 of the Act the Supreme Court had expressed in the decisions referred to above that like all problems associated with industrial adjudication, the problem of wage structure must be based on the proper consideration of the conflicting claims of labour and capital, that there must be a harmonisation on a reasonable basis, and that if it appears that the employer cannot really bear the burden of an increasing wage bill, industrial adjudication cannot refuse to examine his case and should not hesitate to give him relief if it is satisfied that if such relief is not given the employer may have to close down his business.

12. I am, therefore, inclined to take the view that the company can also approach the Conciliation Officer under section 12 (1) if there is a disagreement between the management and the workmen on certain vital matters which are likely to affect industrial peace and to create industrial unrest and also for reference under section 10 (1) if such conciliation fails.

13. As regards the second question, the stand taken by the Government and the union is that even in the existing reference the company can put forward its plea for a reduction of dearness allowance, pay scales, duty allowance and the retirement age and that there is no necessity for a separate reference on those issues. But having regard to the points set out for adjudication in the annexure, it is not possible to say that the company will be entitled to raise its pleas in respect of all the above four matters. The annexure to the impugned order sets out the following questions for adjudication.

(1) To fix the age of retirement of the employees and the date from which it should be given effect to.

(2) To fix the quantum of bonus payable to the employees for the year 1973.

(3) Whether the demand of the workmen for revision of scales of wages for various categories of workmen is justified; if so, to fix the date.

(*a*) The revised scales of wages ;

(*b*) The manner of fitment ; and

(*c*) The date from which the revision should be given effect to.

(4) Whether the demand for revision of the scheme of dearness allowance is justified; if so, to formulate the revised scheme.

(5) Whether the demand for revision of the existing leave facilities is justified; if so, to specify the revised leave facilities to be provided.

(6) Whether the demand for leave fare assistance is justified; if so, to formulate a scheme.

(7) Whether the demand for duty allowance is justified; if so, to fix the rate.

(8) Whether the demand for payment of lunch/supper/tiffin allowance is justified if so, to fix the rate of allowance to be paid under each item.

(9) Whether the demand for payment of house rent allowance is justified; if so, to fix the rate.

(10) Whether the demand for payment of city compensatory allowance is justified; if so, to fix the rate."

14. Items 1 and 7 in the annexure deal with the age of retirement and duty allowance. In my view they are wide enough to include the management's plea that there should be a reduction in the retirement age and duty allowance, and therefore, the stand taken by the Government and the Union that the management can urge all its pleas including the plea for reduction of the retirement age and duty allowance before the Tribunal, on the questions as referred appears to be tenable. Therefore, there is no necessity or justification for making a separate reference on that question as claimed by the company.

15. However, on the question of revision of dearness allowance and rationalisation of pay rolls, the questions referred (items 4 and 3) appears to cover only the demands made by the workmen for upward revision and not the company claim for a downward revision. On the question as referred to in relation to these two matters, the company's claim that there should be a downward revision of the pay scales and dearness allowance cannot be gone into. Therefore the questions (items 3 and 4) relating to the rationalisation of pay rolls and revision of dearness allowance cannot be said to be comprehensive enough to include the claim raised by the company that there should be a substantial reduction in the salary as well as dearness allowance. That the company raised its claim for downward revision in respect of both the matters even in the first instance as soon as the workmen demanded an upward revision of those items, is clear from its letter dated 20th May, 1974 addressed to the General Secretary of the Union and its letters dated 18th June, 1974 and 6th November, 1974 addressed to the Labour Officer. The report of the Labour Officer sent to the Government specifically refers to the four demands made by the company before him, and to the suggestion of the company that :

> Since their demands on dearness allowance and retirement age have also been raised by the union, these demands could be referred for adjudication simply as dearness allowance and retirement age without details of the demands raised by either party. According to the management, by this both the parties would be able to press their views and contentions and the adjudicator would have an open and free hand to decide the issues."

In the light of the above report from the Conciliation Officer and the specific issues raised by the company with reference to the claim of the workmen for revision of dearness allowance and pay scales, the Government should have referred the dispute in respect of those two matters in general terms instead of restricting the reference to the demands made by the workmen.

16. Apart from the question as to whether the management can seek a reference under section 10 (1) if a reference is made at the instance of the workmen, all matters ancillary and incidental to their demands should be referred to even as per the wording of section 10 (1) (*c*) and (*d*) which states that all ancillary matters relating to the dispute should also be referred to for the purpose of proper adjudication by the Labour Court or Tribunal. In this case, when the Government referred the demands of the workmen for dearness allowance and revision of pay scales to the Tribunal it cannot overlook the claim made by the management that there should be a downward revision of the dearness allowance and the pay scales, which they

have specifically raised from the beginning. If an adjudication is made on the demands for upward revision of dearness allowance and the revision of pay scales without reference to the management's claim that there should be a downward revision, then the management will have no opportunity to bring their claims before the Tribunal at a later stage. Therefore, the impugned reference so far as it relates to items 3 and 4 is quashed with a direction to the first respondent to make a fresh reference in respect of those two items so as to take in the demands of the workmen for upward revision and the claim of the company for downward revision. Thus, both the writ petitions are partly allowed with a direction to the first respondent as indicated above. There will, however, be no order as to costs.

S.J. — *Petitions partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Maharajan, J.*

Ramaswamy Reddiar .. *Appellant**

v.

Adilatchumy Ammal and another .. *Respondents.*

Will—Construction—Bequest in favour of 'A' and 'K' for life with no powers of alienation—Vested remainder to 'S'—'S' predeceasing 'K'—Nature of estate taken by 'K'—Code Civil— ' Substitution fidei commissaire"*—Definition of—Exceptions to—" Usufruit'—Meaning according to French Law.*

The doctrine of "*substitution fidei comissaire* " was borrowed by Fench Roman Law. It was subject to great abuse during the pre-revolutionary days and was violating the rule against perpetuity. When the Code Civil was created in the early years of the 19th century, the framers of the Code positively prohibited. " *substitution fidei commissaire*" though they recognised two exceptions : (i) it is lawful for any one to give or bequeath property to any one or more of the grantor's children, subject to the obligation to transmit the same to all the children, born or to be born of the grantee or grantees equally; (ii) it is lawful for a person, who dies childless to give or bequeath property to any one or more of his brothers or sisters subject to the obligation to transmit the same to all the children born or to be born of the grantee or grantees equally. *Substitution fideicommissaire,* is prohibited by French Law and according to French jurists, the Hindu Law does not prohibit; and it can therefore be resorted to by Hindus. [*Para.* 8.]

Construction of a will is the result of a process of apprehending the intention of the testator with the aid of the words used by him in the testament. The ascertainment of the testamentary intention depends on the language of the will, and not upon the system of law governing the testator. It must be the same, whether the paper has been executed in France or in India, though no doubt, the legal effect of what the instrument says may vary from one system of law to another. *Substitution fidei commissaire* is not a magical incantation by invoking which a person, who is merely a *usufructier* under the will, can, upon the ranked proprietor predeceasing her, claim an enlargement of her limited right of enjoyment into an absolute right of ownership. [*Paras.* 10 *and* 14.]

It is true that the two kinds of devises—*substitution fidei commissaire* on the one hand, and *nue propriete* on the other—on a superfical view, are deceptively similar. But the one thing which distinguishes *substitution fidei commissaire* from a bequest of usefruct in favour of one person and that of *nue propriete* in favour of another, is that in the former case, a fiduciary obligation is imposed upon the "*greve*" (the first legatee) to preserve the property for the benefit of the "*appele*" but in the case where there is merely a bequest of usufruct in favour of one and the bequest of "*nue propriete*" in favour of the other no such fiduciary relationship subsists between the usufruitier and the *nue proprietaire.* [*Para* 15.]

Held in the circumstances that the intention of the testator was merely to let 'K' enjoy the usufruct of the property so long as she was alive and to give the ownership of the property to

*S.A. No. 548 of 1973. (P.) 31*st March,* 1975.

'S' subject to the usufruitier's right of enjoyment for the term of her life.

[*Para.* 15.]

Cases referred to ;—

Adame v. *Mrs. Gray*, 48 M.L.J. 707: 90 I.C. 5 ; A.I.R. 1925 Mad.599 ; *Lakshmana Nadar* v. *Ramier*, 1953 S.C.R. 848 : (1953) 1 M.L.J. 834 : 1953 S.C.J. 420 : A.I.R. 1953 S.C. 304.

Appeal against the decree dated 25th September, 1972, of the District Court (Principal) Pondicherry in Appeal Suit No. 12 of 1972 preferred against the decree of the Court of the Additional Subordinate Judge, Pondicherry in Original Suit No. 277 of 1968 dated 31st August, 1971.

V. S. Ramakrishnan, for Appellant.

J. Stanislas and *N. Rajaram*, for Respondents

The Cout delivered the following

JUDGMENT.—The plaintiff has preferred this second appeal against the judgment of the Principal District Judge, Pondicherry, in A.S.No. 12 of 1972, confirming the judgment of the Additional Subordinate Judge, Pondicherry, in O.S.No. 277 of 1968 and dismissing the plaintiff's suit with costs.

2. The plaintiff, Ramaswamy Reddiar, sued Adilatchumy Ammal (first defendant) and Appasamy Nayagar (second defendant), husband of the first defendant, for annulment of the sale-deed dated 10th September, 1958, executed by one Kamalammal in favour of the first defendant in respect of the suit property and for recovery of possession of the property with costs.

3. The suit itself was filed under the following circumstances : The suit property originally belonged to one Rayalu Reddiar, who died on 26th October, 1946, after disposing of all his properties under a notarial testament (Exhibit A-1) dated 10th April, 1946. The testator begot no issue. At the time of the will and of his death, he had the following relatives : (1) Adilatchumy Ammal, his wife; (2) Sambasiva Reddiar, his wife's sister's son ; and (3) Kamalammal, the testator's sister, who was then a widow and presumably childless. Under the will which is in French, he bequeathed the suit property to Kamalammal to be enjoyed by her for the term of her life without any power to mortgage, gift or sell the same. As regards all his other properties, movable, immovable and outstandings, he bequeathed the same to his wife, Adilatchumy Ammal to be enjoyed by her after his death without any liberty to alienate. The next clause in the will, which has been the subject of controversy between the parties, may be translated as follows :

> "After the death of Kamalammal and Adilatchumy Ammal, my aforesaid properties shall belong, *in full ownership and with all powers of alienation*, to my nephew Sambasiva Reddiar. I also decide that after my death, my business concern shall be run by Sambasiva Reddiar and accounts in respect thereof renderad by him to my wife. The said Sambasiva Reddiar will perform all my funeral cremonies and those of my wife, Adilatchumy Ammal."

After the death of the testator on 26th April, 1946, Kamalammal took possession of the property in pursuance of the bequest made to her. It was admitted by both counsel before me that Sambasiva died sometime after the testator's death and Sambasiva's heir is the plaintiff, who is his brother. Subsequently, that is to say, on 10th September, 1958, Kamalammal sold the suit property under a notarial deed in favour of the first defendant, Kamalammal herself died on 17th May, 1967. On 16th September, 1967, the plaintiff instituted the suit, out of which this second appeal arises.

4. The trial Court, upon an interpretation of the will, held that as Sambasiva Reddiar predeceased both the testator and Kamalammal, the latter became the absolute owner of the property by operation of the doctrine of "*substitution fidei commissaire*". The trial Court also held that if the testator had stated in his will that Kamalammal would have the usufructuary right and after her death, the *nue propriete* should go to his nephew (Sambasiva Reddiar), there would be no *substitution fidei-commissaire*, and Sambasiva Reddiar would have become the owner of the property from the date of the demise of the testator, and the plaintiff would, on the death of Sambasiva Reddiar, become entitled to the

property as his heir. It is admitted that the trial Court committed an error in assuming that Sambasiva predeceased the testator. However, upon the construction put by the trial Court on the will, it dismissed the suit with costs.

5. Against this judgment, the plaintiff preferred an appeal to the Principal District Judge, Pondicherry. Before the learned Judge, it was contended on behalf of the plaintiff that under the will, Sambasiva Reddiar had obtained a vested interest under section 19 of the Transfer of Property Act, though possession of the property was postponed till after the lifetime of Kamalammal. The learned Judge held that the Transfer of Property Act was extended to Pondicherry only on 9th January, 1969 and the construction of the will must, therefore, be governed by the French substantive law. According to the learned Judge, Articles 1040 and 1041 of the Code Civil ought to govern the interpretation of the will. The learned Judge quoted Article 1040, which says as follows :

> "All dispositions by will which are made conditional on the happening of an uncertain event and which the testator does not intend to effectuate until such event happens or does not happen (as the case may be), lapse if the person nominated heir or the person in whose favour they are made dies before the condition has been fulfilled."

The learned Judge also cited Article 1041 of the Code Civil which is to the following effect :

> "A condition that is only intended by the testator to suspend the carrying out of a bequest does not prevent the person made heir or the beneficiary acquiring a vested interest, which is transmissible to his heirs."

Treating the contemplated death of Kamalammal as an uncertain event (and this is wrong, because nothing is more certain than human mortality), the learned Judge proceeded to hold that inasmuch as the testator had specifically laid down a condition that Sambasiva Reddiar should take the property absolutely only after the death of Kamalammal, he did not get any right over the property, because he predeceased Kamalammal and consequently, the plaintiff could not get any right as heir of Sambasiva Reddiar. In this view, the lower appellate Court dismissed the plaintiff's appeal. It is against this dismissal that the present second appeal has been filed.

6. The main question that arises for consideration is the one which turns upon a true construction of the will Exhibit A-1, *i.e.*, whether upon the death of the testator, leaving him surviving Kamalammal and Sambasiva Reddiar, the ownership in the suit property vested in Sambasiva Reddiar subject to the right of Kamalammal to enjoy the property for the term of her life without any power of alienation or whether the ownership of the property (qualified by certain restrictions on alienation) vested in Kamalammal subject to the condition that absolute ownership of the property would pass to Sambasiva Reddiar if he survived Kamalammal, and in case Sambasiva Reddiar predeceased Kamalammal, the latter would become entitled to the property absolutely free from the restrictions imposed by the testator on her powers of alienation.

7. The argument of Mr. Cojandavelu, learned counsel for the respondents, runs as follows: The terms of the will are such that what is called *substitution fideic ommissaire* in French Law has been created under the will. It is true that Article 896 of the Code Civil prohibits *substitution fidei commissaire*: but so far as the Hindus, Muslims and Christians in the erstwhile French India were concerned, they were governed by their personal law, and not by the Code Civil, and the Code Civil provisions would apply only if the personal law made no provision and to the extent it was not inconsistent with the spirit of the personal law. So far as the testator in this case is concerned, he was a Hindu governed by the French Hindu Law, and as there was nothing in the Hindu Law, which prohibited *substitution fidei commissaire*, the will would be valid despite the prohibition contained in Article 896 of the Code Civil. If the will has created *substitution fidei commissaire*, it must be held under French Law that Kamalammal became the absolute owner of the suit property on the death of the testator subject to the resolutory condition that in case she died and Sambasiva survived her, the latter would get the property absolute-

ly. If Sambasiva (appele) predeceased Kamalammal (greve) Kamalammal would become the absolute owner of the property notwithstanding that the testator had provided that she should enjoy the property only for her lifetime without any power to mortgage, gift or sell the property. According to Mr. Cojandavelu, under the doctrine of *substitution fidei commissaire,* Sambasiva would get no interest in the property, unless he fulfilled the condition of surviving Kamalammal. Mr. Cojandavelu, who formulated this argument, has been an *ayacut-conseil* at Pondicherry, for a number of years under the French system. I think it, therefore, necessary to examine his arguments at some length and with the deference that is due to his experience.

8. The doctrine of "*substitution fidei commissaire*" was borrowed by French Roman Law. It was subject to great abuse during the pre-revolutionary days and was violative of the rule against prepetuity. That is why when the Code Civil was enacted in the early years of the 19th century, the framers of the Code positively prohibited *substitution fidei commissaire* (vide Article 896) though they recognised two exceptions: (*i*) it is lawful for any one to give or bequeath property to any one or more of the grantor's children, subject to the obligation to transmit the same to all the children born or to be born of the grantee or grantees equally; and (ii) it is lawful for a person, who dies childless to give or bequeath property to any one or more of his brothers or sisters, subject to the obligation to transmit the same to all the children, born or to be born of the grantee or grantees equally (vide page 132 of Ames and Walton's "Introduction to French Law"—Second Edition). These exceptions are not relevant for the purposes of this case. Though the French Law prohibited *substitution fidei commissaire* making these two exceptions, the Supreme Court of France (*Cour de cassation*) and the *Cour d' appeal* in Pondicherry have held that the Hindus in French India are not within the mischief of this prohibition of Code Civil, because they are governed by their personal law and there is nothing in their personal law which prohibits *substitution fidei commissaire* (Vide De Langlard—Lecons of Hindu Law—page 350—quoted at page 22 in Gnaneu Ambreises booklet on *substitution fidei commissaire*)". As there is some confusion involved in this area of French Indian Law and as there is a tendency for life interest holders under a will in the situation of Kamalammal to claim absolute rights by invoking the doctrine of *substitution fidei commissaire,* it is necessary to clear the ground by defining the ingredients, which go to constitute *substitution fidei commissaire.* As observed by Dalloz in his "Repertoire Pratique" (Volume 11) page 518, Note 3.

> "The substitution prohibited by the Code Civil can be defined; all dispositions by which the first beneficiary is juridically obliged to conserve the property for the duration of his life, and after his death, to render to another beneficiary the object of the bequest on condition that he survives the first beneficiary."

Note 4 sums up French jurisprudence in this behalf:

> "Three elements are essential for constituting a prohibited substitution: (1) a double liberality consisting of two donations or two bequests, one in favour of the *greve* and the other in favour of the *appele*: (2) the establishment of an order of succession by which after the *greve* has been the owner of the property for the term of his life, the object of the bequest shall become after his death, the property of his substitute, (*viz*., the *appele*); and (3) the juridical obligation to conserve the property and to hand over the object of the bequest to the substitute should be imposed upon the *greve.*"

In other words, if a property is bequested to "A" to be enjoyed by him for life and to go to "B" after his life, and "A" is obliged under the testament to conserve the property and hand it over intact to "B" after "A"'s' death, the devise would be called *substitution fidei commissaire.* This is the kind of *substitution* which the French Law prohibits, but which, according to the French jurists, the Hindu Law does not prohibit, and can, therefore, be resorted to by Hindus. If such a *substitution* is resorted to by a Hindu, continues the argument

and "B" predeceases "A", the fiduciary responsibility of 'A' to hand over the property on his death to 'B' terminates and "A" becomes the absolute owner of the property (Vide "Repertoire Pratique"—Dalloz Volume 11, page 551 Notes 614 and 615.

9. Now let me examine whether Exhibit A-1 really constitutes *substitution fidei commissaire*, so that Kamalammal may be enabled to claim absolute right to the suit property on Sambasiva predeceasing her. I have already abstracted the relevant passages from the will, the essential terms of which are :

(1) "I bequeath the property to my sister Kamalammal for her to enjoy for the duration of her life without having any power to mortgage, gift or sale."

(2) "After the death of the said Kamalammal (and Adilatchumi Ammal), my properties abovesaid shall belong *in full ownership* and *with all powers of alienation* to my nephew Sambasiva Reddiar."

I have searched Exhibit A-1 in vain for any term which could be construed as imposing an obligation upon Kamalammal to preserve the property for the benefit of Sambasiva Reddiar. What the first clause does is only to give Kamalammal a mere right to enjoy the property without any of those powers which an absolute owner would be entitled to enjoy. Learned counsel for the respondents contends that the embarge placed upon Kamalammal's power to mortgage, gift or sell the property carries with it, by necessary implication, an obligation preserve the property for the benefit of Sambasiva. I do not think it fair or reasonable to draw such an inference. It is the duty of the Court to sit in the armchair of the testator and distil his intention from the words employed by him in the testament, and while doing so, the Court has to take into account the sentiments and inhibitions of an average Hindu which must have influenced the intentions of the testator, who was......undoubtedly a Hindu. He had no children, male or female. He was executing the testament in 1946, in which year he must have shared the prevalent prejudice of Hindu society against conferring absolute estate on women and in favour of giving an absolute estate only to males, especially to those who are competent to perform funeral oblations. At the time of the testament, neither Adilatchumi Ammal, who was the wife of the testator, nor Kamalammal, who was the widowed sister of the testator, could, in the eyes of a Hindu, be the object of more than a limited bounty. Neither of them being a male, who could perform funeral obsequies, and neither of them having any male issue, the testator appears to have pitched upon Sambasiva Reddiar, the son of his wife's sister, as the person entitled and competent to receive on absolute estate in the property. I think it, therefore, artificial to affix to Exhibit A-1 the label of *substitution fidei commissaire* and then proceed to hold that what the testator intended to bequeath in favour of Kamalammal was only absolute ownership with resolutory conditions.

10. Learned counsel lays great emphasis upon the words '*sores le dèces*' (after the death) for the purpose of making out that no present interest in favour of Sambasiva Reddiar was sought to be bequeathed and that the condition precedent to Sambasiva Reddiar getting absolute ownership of the property was that at the time of the death of Kamalammal, he should be alive. Construction of a will is the result of a process of apprehending the intention of the testator with the aid of the words used by him in the testament. The ascertainment of the testamentary intention depends on the language of the will, and not upon the system of law governing the testator. It must be the same whether the paper has been executed in France or in India, though, no doubt, the legal effect of what the instrument says may vary from one system of law to another. The expression "after the death of Kamalammal must be taken to indicate merely the time when the gift over becomes reduced to possession, and not the time when the right to such possession vests—vide *Adame* v. *Mrs. Gray*[1].

11. In *Lakshmana Nadar and others* v. *R. Ramier*[2], one Lakshminarayana Iyer, a Hindu, gave the following directions in his will :

1. 48 M.L.J. 707 : 90 I.C. 5 : A.I.R. 1925 Mad. 599 at 602.

2. 1953 S.C.R. 848 : (1953) 1 M.L.J. 834 : 1953 S.C.J. 420 : A.I.R. 1953 S.C. 304.

" After my lifetime, you the aforesaid Ranganayaki Ammal, my wife, shall till your lifetime, enjoy the aforesaid entire properties.................

After your lifetime, Ramalakshmi Ammal, our daughter and her heirs shall enjoy them with absolute rights and powers of alienation such as gift, exchange and sale from son to grandson and so on for generations. "

12. While construing this clause, their Lordships of the Supreme Court observed as follows :

" Consisting the will in the light of these principles, it seems to us that Lakshminarayana Iyer intended by his will to direct that his entire properties should be enjoyed by his widow during her lifetime but her interest in these properties should come to an end on her death, that all these properties in their entirety should thereafter be enjoyed as absolute owners by his daughter and her heirs with powers of alienation, gift, exchange and sale from generation to generation. He wished to make his daughter a fresh stock of descent so that her issue, male or female, may have the benefit of his property. They were the real persons whom he earmarked with certainty as the ultimate recipients of his bounty. In express terms he conferred on his daughter powers of alienation by way of gift exchange, sale, but in sharp contract to this, on his widow he conferred to such powers. The direction to her was that she should enjoy the entire properties including the outstandings, etc., and these shall thereafter pass to her daughter. Though no restraint in express terms was put on her powers of alienation in case of necessity, even that limited power was not given to her in express terms. If the testator had before his mind's eye his daughter and her heirs as the ultimate beneficiaries of his bounty, that intention could only be achieved by giving to the widow a limited estate because by conferring a full Hindu widow's estate on her the daughter will only have a mere *spes succession is* under the Hindu Law which may or may not nature and under the will her interest would only be a contingent one in what was left undisposed of by the widow."

13. In this case, the testator has made it clear that Kamalammal should enjoy the property only for the duration of her life and that too, without any power to sell, to gift or even to mortgage, whereas while describing the nature of the estate bequeathed to Sambasiva Reddiar, he makes it clear that the property shall belong to him "in full ownership and with all powers of alienation." These words establish that Sambasiva was the person whom the testator earmarked with certainty as the ultimate recipient of his bounty. The mere use of the future tense, "shall belong to Sambasiva", cannot any manner camouflage or detract from his undoubted intention to give Sambasiva absolute ownership of the property on the date of death of the testator, although it is indicative of his intention to postpone his possession of the property till after the lifetime of Kamalammal. While coming to this conclusion, I wish to make it clear that it has been arrived at upon a plain interpretation of the will uncoloured by the Indo-Anglian legal concept of vested remainder or the Roman concept of *substitution fidei commissaire*, as applied by the French Jurists to wills or gifts executed in the erstwhile French India. I, therefore, hold that the mechanism of the bequest under Exhibit A-1 is radically different from that resorted to in what is called "*substitution fidei commissaire*". I may also note that Exhibit A-1 was drawn by a "*Notaire Public*", an officer of law, well acquainted with French concepts. It is indeed significant that the *Notaire* did not use the term "*substitution fidei commissaire*" anywhere in Exhibit A-1. It is, therefore, wrong to wishfully imagine that Exhibit A-1 is in the nature of *substitution fidei commissaire* and to supply out of an obliging imagination those ingredients without which Exhibit A-1 cannot be regarded as *substitution fidei commissaire*. On the other hand, the will is clearly in conformity with certain express provisions of the Code Civil, which enable the testator validity to bequeath the usufruct of the property in favour of one person and the *nue propriete* (naked ownership, *i.e.*, ownership without possession) in favour of another.

14. Article 899 of the Code Civil expressly says that any gift or testamentary dis-

position whereby the "*usufruit*" is given to one and the naked proprietorship is given to another, shall be valid. I shall next examine what is it that the French Law means by "*usufruit*" (usufruct). Article 578 of the Code Civil defines *usufruit* to mean the right of a person to enjoy a thing belonging to another as if he were the owner himself, but subject to the duty of keeping intact the corpus of the thing. Article 579 of the Code Civil says that this right of usufruct can be established either by law or by volition of man. Article 580 says that the *usufruit* can be created either simpliciter without limitation or upto a certain day or subject to conditions. Article 617 says that the usufruct is extinguished:

> "by the natural death or the civil death of the usufructuary:
>
> by the expiration of the time for which it was granted;
>
> by the consolidation or re-union in the same person of the capacity of the usufructuary and that of the proprietor ;
>
> by non-usage of the right for thirty years;
>
> by total loss of the thing upon which the *usufruit* has been established."

Article 621 of the Code Civil says that the sale of the property by the owner subject to the usufruct shall not alter in any manner the right of the usufructuary who will continue to enjoy the same. The provisions which I have cited above give us some idea of the French notion of the usufruct. If we consider the rights which have been given under the will to Kamalammal in respect of the suit property in the light of the aforesaid provisions of the Code Civil, it would be found that what Kamalammal has been given is nothing but a *usufruit*. The will says that Kamalammal should enjoy the suit property, but shall have no power to mortgage or gift or sell the same. This shows that she had a duty as usufructuary to conserve the corpus of the property —vide Article 578 of the Code Civil. The will also makes it clear that Kamalammal should enjoy the property for the term of her life. The *usufruit* that has been granted by the testator in favour of Kamalammal is subject to the condition that it shall be extinguished with the natural death of Kamalammal—vide Article 617 of the Code Civil. It would, therefore, follow that what the testator intended to grant in favour of Kamalammal was only the *usufruit* within the meaning of the Code Civil. The holder of the *usufruit* has under Article 578, the right to enjoy the property as if he were the proprietor; but he is certainly not the proprietor of the property, because he is under a responsibility to keep intact the corpus of the property. The "*nue propriete*" is one in whom the title to the property vests without a present right to enjoyment thereof. Upon a proper construction of the will in this case, Sambasiva Reddiar got the naked ownership of the property the moment the testator died though his right to get physical possession of the property was postponed till after the death of the *usufruitier viz*. Kamalammal. The mere circumstance that the *nue proprietaire* predeceased the *usufruitier* does not under the French Law either extinguish the rights of the heirs of the *nue proprietaire* to the naked ownership or enlarge the rights of the *usufruitier* into those of an absolute owner of the property. In fact Article 1041 of the Code Civil makes it clear that a condition, which, according to the intention of the testator, would only suspend the coming into force of a bequest, does not prevent the legatee from acquiring a present right and transmitting it to his own heirs. In this case, the intention of the testator was to give the entire ownership of the property to Sambasiva Reddiar, but to suspend his right of possession thereof till after the lifetime of Kamalammal. Therefore the testamentary condition suspending the carrying out of the bequest in favour of Sambasiva Reddiar did not prevent Sambasiva Reddiar from acquiring a present interest in the property as *sue proprietaire* and transmitting the same on his death to his heirs. A fair and proper reading of the will shows that upon the testator's death, Sambasiva Reddiar was intended to get and did in fact get a vested interest in the property, which upon his demise devolved upon the plaintiff, his heir. The Courts below have entirely misconstrued the provisions of the will. *Substitution fidei commissaire* is not a magical incantation

by invoking which a person who is merely a *usufruitier* under the will, can, upon the naked proprietor predeceasing her claim an enlargement of her limited right of enjoyment into an absolute right of ownership.

15. It is necessary to distinguish between an arrangement of *substitution fidei commissaire,* on the one hand and a devise whereby a usufruct is conveyed to one person and the *nue propriete* to another. It is true that these two kinds of devises are on a superficial view, deceptively similar. But the one thing, which distinguishes *substitution fidei commissaire* from a bequest of usufruct in favour of one person and that of the *nue propriete* in favour of another is that in the former case, a fiduciary obligation is imposed upon the "*greve*" (the first legatee) to preserve the property for the benefit of the "*appele*", but in the case where there is merely a bequest of usufruct in favour of one and the bequest of *nue propriete* in favour of the other; no such fiduciary relationship subsists between the *usufruitier* and the *nue proprietaire.* If the *usufruitier* is obliged under Article 578 of the Code Civil to conserve the corpus of the property, it is not because he has any fiduciary obligation to preserve the property for the benefit of the *nue proprietaire* but because his right is confined to the enjoyment of the produce of the property without any detriment to the corpus of the property. This obligation of the *usufruiter* to enjoy the produce of the property without detriment to the corpus thereof ought not to be confused with any fiduciary obligation. The intention of the testator was merely to let her enjoy the usufruct of the property so long as she was alive and to give the ownership of the property in *preaesenti* to Sambasiva Reddiar subject to the *usufruitier's* right of enjoyment for the term of her life.

16. The sale effected by Kamalammal, the *usufruitier,* in favour of the first defendant on 10th September, 1958, in respect of the suit property could enure in favour of the alienee only so long as Kamalammal was alive, and the moment Kamalammal died on 17th May, 1967, the usufructuary right got extinguished with her death, and the first defendant, her vendee, ceased to have any right to enjoy the suit property. On the other hand, the plaintiff, who is the undisputed heir of Sambasiva Reddiar and upon whom the "naked" ownership of the property had devolved on the death of Sambasiva Reddiar, became entitled, upon the death of Kamalammal, to immediate possession of the suit property. Consequently I hold that the sale deed obtained, by the first defendant from Kamalammal on 10th September, 1958, did not confer upon the first defendant anything more than the right to be in enjoyment of the suit property, so long as Kamalammal was alive, and the said sale deed must be annulled in so far as it purported to convey any right in excess of the sufructuary right of Kamalammal. The plaintiff will, therefore, be granted a decree embodying a declaration to that effect and directing the defendants to deliver possession of the suit property to the plaintiff. The judgment and decree of the Courts below are reversed and the appeal allowed with costs throughout. Leave granted.

R.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*N. S. Ramaswami, J.*

M. P. Venkatachalapathy Iyer and Sons, a firm of registered Partnership having its office at No. 67, Manjanakara Street, Madurai Town, by one of its Partners, M. P. V. Ramamoorthy .. *Appellants**

v.

Balasubramaniam and others .. *Respondents.*

K.M.S. Lakshmanier & Sons through one of its Partners K.M.S.L. Neelakantan .. *Appellants*

v.

T.K.V.S.N. Rajaram .. *Respondent.*

and

M. P. V. Ramamoorthy and another *Appellants**

v.

T.K.V.S.N. Rajaram .. *Respondent.*

Forward Contracts (Regulation) Act (LXXIV of 1952), section 18 (1)—Forward Contracts—Plaintiffs members of unregistered Association—Contracts as per bye-laws of Association—Contracts whether offend the Act—Contracts held illegal.

The plaintiffs were members of the Madurai Yarn Merchants Association which was not a recognised one as defined in section 2 (*j*) of the Act LXXIV of 1952. The plaintiffs had entered into forward contracts and filed suits for alleged breach of such contracts. In most of the contracts between the parties, only differences in price as fixed by the Association were being adjusted. On the question whether the contracts were illegal,

Held: The proviso to section 18 (1) of Act LXXIV of 1952 applied and the contracts, though non-transferable specific delivery contracts, being between members of an unrecognised, unauthorised association were illegal. [*Para.* 24.]

Cases referred to :—

Ramdutt Ramkissen Dass v. *E.D. Sassoon and Company*, (1929) 56 M.L.J. 614: 56 I.A. 128: 115 I.C. 713: A.I.R. 1929 P.C. 103; *Khardoh Co., Ltd.* v. *Raymon & Co.*, (1963) 3 S.C.R. 183: A.I.R. 1962 S.C. 1810; *Modi & Co.* v. *Union of India*, (1969) 1 S.C.J. 176: (1968) 2 S.C.R. 565: A.I.R. 1969 S.C. 9; *State of Gujarat* v. *Manilal Joitaram*, (1968) 2 S.C.J. 184: (1968) M.L.J. (Crl.) 389: (1968) 2 S.C.R. 177: A.I.R. 1968 S.C. 653.

Appeals against the decrees of the Court of the II Additional Subordinate Judge, Madurai, dated 12th April, 1965 in Original Suit Nos. 19, 28 and 32 of 1963.

R. Desikan and *L.K. Sankaran*, for Appellants.

K. Saravabhauman and *T.R. Mani*, for Respondents.

The Court delivered the following

JUDGMENT.—These three appeals are against the dismissal of three suits, all for recovery of damages for breach of contract. Though the parties are not identical in the three suits, they came to be tried jointly, by consent of parties, as common questions of law and similar questions of fact arose in all these cases. A.S.No. 365 of 1967 is by the plaintiffs in O.S.No. 19 of 1963; A.S. No. 790 of 1967, is by the plaintiffs in O.S.No. 28 of 1963 and A.S.No. 533 of 1968 is by the plaintiffs in O.S.No. 32 of 1963 on the file of the Court of the Subordinate Judge, Madurai. In each of these suits, the claim was for damages for alleged breach of forward contracts in 40s count yarn of Sri Meenakshi Mills of Madurai, In each of the three suits, the respective plaintiffs were the purchasers and the defendants, the sellers under the forward contracts.

2. It is common ground, that the months of delivery under the various forward contracts between the parties now in dispute are December, 1959 to March, 1960. There had been similar contracts for earlier months; but there is no claim in

* Appeals Nos. 365, 790 of 1967 and 533 of 1968. 16*th April*, 1975.

respect of these contracts. According to the plaintiffs, they had been performed in accordance with the terms of the contracts but according to the defendants, the so-called performance during the earlier months was only by adjusting the difference between the contract price and the price fixed by the Yarn Merchants Association, for the months in which delivery was to be given as per the letter of contract. It is the case of the defendants that the parties to the suits who are yarn dealers as well as many other yarn dealers in Madurai, being members of the Yarn Merchants Association, Madurai (which is not a recognised association) have been indulging in betting in respect of 40s count yarn produced by the Sri Meenakshi Mills. According to them for a month only about 200 bales of 40s count were being produced by the said Mills that out of that quantum only a portion would be supplied by the Mills to the seven authorised dealers in Madurai (out of whom one is Seethalakshmi Ammal the second defendant in O.S.No. 19 of 1963), but the yarn merchants in Madurai who are members of the abovesaid unrecognised association had been transacting "business" in over 2000 to 3000 bales of 40s count every month. It is their case that in the several forward contracts that had been entered into between the parties to the suit, the intention of the parties was not that there should be actual delivery but only the difference in the contract price and that fixed for the particular month by the Association, was to be adjusted between the parties.

3. It is common ground that the parties to the suit as well as other yarn merchants in Madurai had been contracting to sell or buy 40s count yarn of Sri Meenakshi Mills far in excess of availability. There had been no dispute between the dealers till December, 1959. It is not disputed that in most of the cases the performance of the forward contracts was not by actual delivery (as contemplated by the letter of the contracts), but by adjusting the difference between the contract price and that fixed for the respective month by the Association. It is again common ground that in December, 1959, the Forward Market Commission sent a communication to the abovesaid Madurai Yarn Merchants Association, that what was being indulged in by its members, in respect of 40s count of yarn of Sri Meenakshi Mills, Madurai was illegal. Admittedly, in respect of 40s count yarn of Sri Meenakshi Mills, there had always been a notification in force declaring section 15 of the Act to apply to such goods in the area in question. As in spite of such notification being in force, the members of the Yarn Merchants Association, Madurai, had been entering into forward contracts and adjusting the difference through the media of the Association, the abovesaid communication was sent by the Forward Markets Commission. It was after the receipt of such a communications, disputes arose between the parties. While till then, the difference was being adjusted, after the receipt of the said communication (and after the defendant issued notices stating that the contracts were void) the plaintiffs began to demand actual delivery.

4. The Court below has accepted the case of the defendant and negatived the claim of the plaintiffs in all the three suits. It has held that all the suit contracts are nothing but wagers. It also found that the contracts in question offend the provisions of the Forward Contracts (Regulation) Act (LXXIV of 1952) (hereinafter referred to as the Act). As far as O.S. No. 28 of 1963 is concerned, there is an additional plea, namely, one of limitation. It is not in dispute that if the time taken in prosecuting the Arbitration Proceedings, initiated by the plaintiffs in that suit, cannot be excluded in computing the period of limitation, then a part of the claim in that suit is barred by limitation. But according to the plaintiffs in that suit, section 14 of the Limitation Act, applied and that the period during which the Arbitration Proceedings were pending should be excluded from computation. In this connection, the learned counsel for the plaintiffs appellants referred to the decision of the Privy Council in *Ramdut-Ramkissen Dass v. E. D. Sassoon & Co.*[1]. But that is a case where it is held that even though section 14 had no application to proceedings before the Arbitrator, the

1. (1929) 56 M.L.J. 614 (P.C.): 56 I.A. 128: 115 I.C. 713 : A.I.R. 1929 P.C. 103.

principle of that section may be applied. The question was whether the time taken in prosecuting the proceedings before an Arbitrator (who had jurisdiction) was to be excluded in respect of similar proceedings before another Arbitrator. This decision has no bearing on the facts of the present case. Here the plaintiffs in O.S. No. 28 of 1963 purported to take arbitration proceedings before the abovesaid Yarn Merchants Association. Ultimately after giving up the said proceedings, the suit was filed. If section 14 of the Limitation Act, is to be invoked in this case, the other proceedings the period during which it was pending is sought to be excluded, should have been before a Court. Surely an Arbitrator is not a Court. Though the learned counsel raised the contention that the finding of the Court below regarding limitation is not correct, ultimately he did not press that contention. Therefore, in any event, part of the claim in O.S. No. 28 of 1963, would be time-barred.

5. The main questions, however, are: (1) Whether the forward contracts regarding which damages are claimed on the ground of breach are by way of wager? and (2) whether the suit contracts are illegal as offending the provisions of the Act.?

6. The contention on behalf of the appellants (plaintiffs) is that the evidence on record does not warrant a finding that the contracts are by way of wager, that the contracts being non-transferable specific delivery contracts as defined under the Act, they are exempt from the operation of the provisions of the Act (in view of section 18 thereof) and that, therefore, the plaintiffs are entitled to claim damages as admittedly the defendants who contracted to sell failed to deliver the yarn contracted for, in the respective months.

7. I am of the view that from the evidence on record it cannot be positively held that the contracts in question are in the nature of wager coming under the mischief of section 0 of the Contract Act. But I am clearly of the view that the contracts are illegal as per the provisions of the Act (Forward Contracts (Regulation) Act). Number of decisions were referred to by the learned counsel for the plaintiffs (appellants) in support of his contention that the evidence on record does not warrant the conclusion that the contracts were in the nature of wager. I think it is unnecessary to refer to the various decisions cited at the Bar, because the law is well-settled on the question. Before adverting to the same, I would briefly refer to the evidence on record.

8. M.P.V. Ramamoorthy, who is the partner in the plaintiff firm in O.S. No. 19 of 1963 and who is the first plaintiff in O.S. No. 32 of 1963 has given evidence as P.W. 1. K.M.S.L. Neelakantan one of the partners of the plaintiff firm in O.S. No. 28 of 1963, has given evidence as P.W. 2. M. Balasubramanian, the first defendant in O.S.No. 19 of 1963 is D.W.1. T.K.V.S.N. Rajaram who is the defendant in O.S.No. 28 of 1963, as well as in O.S.No. 32 of 1963 is D.W. 2. Large number of documents have been exhibited on either side.

9. Exhibits A-1 and A-2, both dated 5th August, 1959, Exhibits A-3, A-4 and A-5 of different dates in September, 1959. Exhibits A-6 and A-7 of different dates in October, 1959 and Exhibit A-8 dated 30th November, 1959 are forward contracts between the plaintiffs in O.S.No. 19 of 1963, and the defendants therein by which the defendants are the sellers and the plaintiffs are the purchasers. The contracts provide for supply of certain bales of 40s count yarn of Sri Meenakshi Mills by the end of each month for a certain period. In some of the above contracts, some bales of yarn were to be delivered in December, 1959, some in January, 1960 and some in February, 1960 and some in March, 1960. Even prior to December, 1959, certain number of bales were to be delivered to the plaintiffs under some of the forward contracts. The case of the plaintiffs has been that till the month of November, 1959, the contracts had been performed. The significant fact to be noted is that in the plaint in this suit as well as the plaints in the other two suits, it has not been specifically averred that the performance of the contracts up to the end of 1959 was by actual delivery of the required number of bales mentioned in the forward contracts. The only averment in the plaint is that the contracts had been performed. According to the defendants, the performance of the contracts up to the end of November, 1959 was only by

adjusting the difference in the price fixed in the contracts and that fixed by the Association, for the particular month.

10. Exhibits A-91 to A-99 are the forward contracts between the plaintiff in O.S.No. 28 of 1963, and the defendant therein dated between 1st October, 1959 and 23rd December, 1959, under which the plaintiff is the seller and the defendant, the buyer. The total quantity of bales of 40s count yarn of Meenakshi Mills covered by Exhibits A-91 to A-99 are covered by cross contracts under Exhibits A-100 to A-111. Under Exhibits A-100 to A-111, the plaintiff's the buyer and the defendant is the seller. In this case, it is not claimed that there was actual delivery of bales by one party to the other in any month.

11. Exhibits A-54 and A-55, both dated 10th December, 1959 are forward contracts under which the plaintiffs in O.S.No. 32 of 1963 are the buyers and the defendant therein is the seller. Under each of these two contracts, 75 bales of 40s count are agreed to be supplied at the rate of 25 bales per month in the months of January, February and March, 1960. Exhibit A-56 dated 16th November, 1959 is a cross-contract between the same parties under which the total quantity of yarn is only 25 bales and the delivery provided for is at the rate of 5 bales per month in November, 1959 to March, 1960.

12. Large volume of documentary evidence has been let in to show that in earlier transactions between the parties to the suit as well as those between some of the parties to the suit and third parties, there had been no actual delivery but only the difference in price was being adjusted. It is unnecessary to refer to the several documents in detail because it is not denied by the plaintiffs that in most of the cases of forward contracts in 40s count of Sri Meenakshi Mills yarn, only difference was being adjusted. It is also not in dispute that the forward contracts, which are the subject-matter of the present suits as well as other earlier contracts between the parties and those between the parties to the suit and other merchants (who were all membrs of the Yarn Merchants Association), had been entered into as per the bye-laws of the Association and in the printed forms supplied by the Association.

13. It is also an admitted fact that the parties had been agreeing to sell large quantities of yarn without the least possibility of actual delivery. The plaintiffs in the three suits had not produced account books and other necessary accounts to prove their case that there had been actual delivery of yarn up to the end of November, 1959 under the suit contracts. In the large volume of documentary evidence, there is no cash bill for various transactions between the parties, except one cash bill for the sale of 10 bales between the plaintiff in O.S.No. 19 of 1963, and the defendants therein, but that cash bill is for a transaction some three years prior to the suit transaction (Exhibit A-31 dated 7th August, 1956 is the cash bill). Exhibits A-33, A-35, A-36 and A-37 are no doubt cash bills but those bills are not for transactions between the parties to the suit. They are between some of the parties to the suit and third parties.

14. As already seen, in the plaint there is only a general averment that the forward contracts between the parties had been performed up to the end of November, 1959 and there is no specific averment that bales were being actually delivered by one party to the other. There is intrinsic evidence to show that the "performance" mentioned in the plaint should have been only by adjustment of the difference and not by actual delivery. Exhibit A-26 is a notice sent by the plaintiff in O.S.No. 19 of 1963, to the defendants in which it is stated that even for November, 1959 for which month a total quantity of 35 bales (under the several forward contracts) were to be delivered by the defendants to the plaintiff, there was no actual delivery but the same was cancelled by cross-contracts. It was already noticed that Exhibit A-9, dated 3rd December, 1959 is a cross-contract cancelling the contract as far as December, 1959 is concerned. In that month also as per the letter of the contracts, the defendants in O.S.No. 19 of 1963, had to deliver a total quantity of 35 bales. Exhibit A-9 covers the said 35 bales and therefore admittedly there was no actual delivery in December, 1959.

15. There is no gainsaying the fact that the members of the Yarn Merchants Association, Madurai, including the parties to the suits had been transacting business in 40s count yarn of Sri Meenakshi Mills far in excess of the quantity manufactured by the Mills. The defendants have produced a letter received from the Mills in order to show that only a limited number of bales of 40s count were being manufactured by the Mills during the months of December, 1959 and January, to March, 1960. But the letter by itself would not be evidence regarding the actual quantity manufactured by the Mills. Nobody from the Mills has been called as a witness to speak to the number of bales manufactured in those months. However, there is no lack of evidence in this regard. As already seen, Seethalakshmi Ammal, the second defendant in O.S.No. 19 of 1963 is one of the seven direct dealers for 40s count yarn of Sri Meenakshi Mills getting supply directly from the Mills. None of the other parties to the suits is such a direct dealer. D.W. 1 (the first defendant in O.S. No. 19 of 1963), has stated that the second defendant as a direct dealer from the Mills as well as the other six direct dealers were being allotted by the Mills only 10 bales each of 40s count per month. In cross-examination, he has stated that the Mills used to manufacture only about 100 bales of 40s count per month. The suggestion to the witness was that the Mills would manufacture about 500 bales per month but that suggestion has been denied by the witness. Regarding the quantity supplied to the direct dealers, the evidence of this witness has not been seriously challenged. The witness has also stated that the members of the Association had been entering into forward contracts for large number of bales to the extent of 2500 to 3000 bales per month. This evidence too has not been challenged. D.W. 2 has stated that the Mills were producing about 150 to 200 bales of 40s count per month and only 75 to 100 bales per month would be released to the Madurai dealers. P.W. 2 himself has admitted that the Madurai dealers would be getting a supply of only about 200 bales (of 40s count yarn) per month, but the total number of bales covered by the forward contracts entered into by the various dealers would be about 200 bales a month. Admittedly the plaintiffs in the suits had written to the defendants month after month only to pay the difference in price and had not called upon them to make actual delivery. The evidence on record also goes to show that the parties had been contracting to purchase without the least possibility of paying cash and taking actual delivery, for, the quantity contracted to be purchased is far in excess of the means of the purchaser.

16. As against this, there is the fact that the defendants have not specifically pleaded in their written statements that at the time when the forward contracts were entered into, the common intention between the parties was that the buyer should not ask for actual delivery. As already seen there is evidence to show that there had been instances of actual delivery of small quantities of 40s count yarn between some of the dealers, but that is negligible.

17. The question is whether from the above evidence it can be concluded that the suit contracts are in the nature of wager. Wager is a promise to give money or money's worth upon the determination or ascertainment of an uncertain event. Mere speculation is not wager. It must be shown that there was a definite agreement between the parties (at the time of entering into the forward contract), either express or implied, that delivery should not in any event be demanded. The mere fact that subsequent to the date of the contract the parties agreed to settle the difference or adjust the same without delivery, cannot make the contract a wager. Even if the seller (at the time of entering into the contract) did not intend to deliver and the buyer had also known about such intention on the part of the seller, the contract would not be a wager, as there should be a common intention between the parties to the contract that actual delivery should in no event be insisted upon. The mere fact that for the greater part of the contracts there had been no delivery, but the parties had been adjusting the difference in price cannot by itself make the contract a wager. Similar transactions between other parties is not relevant in deciding the question whether the contract

between the parties is wager or not. The fact that the parties entered into a cross-contract would not also by itself make the original contract a wagering one. In cross-contracts, there is no need to make a farce of tendering the goods or the price.

18. In the present cases, though it is clear that the parties had intended only to take the difference in price, that is contracted for and that fixed by the Association for the respective month, there is nothing to show that there was a definite mutual understanding between the parties at the time of entering into the respective contracts, that the buyer shall in no event insist upon delivery. Therefore, on that ground it has to be held that the contracts in question are not hit by section 30 of the Contract Act.

19. However, the position is different regarding the question that arises in relation to the provisions of the Act (The Forward Contracts (Regulation) Act). Section 15 of the Act says that the Central Government may, by notification in the Official Gazette declare the said section to apply to such goods or class of goods and in such areas as may be specified in the notification, and thereupon any forward contract for the sale or purchase of any goods specified in the notification, which is entered into in the area specified therein otherwise than between members of a recognised Association or through or with any such member, shall be illegal. This is subject to the exception contained in section 18. Sub-section (1) of section 18 says, nothing contained in Chapter IV (section 15 appears in Chapter IV) as well as in Chapter III shall apply to non-transferable specific delivery contracts for the sale or purchase of any goods. But this provision is again subject to the proviso thereof. The said proviso is as follows :

> "Provided that no person shall organize or assist in organising or be a member of any association in any area to which the provisions of section 15 have been made applicable (other than a recognised association) which provides facilities for the performance of any non-transferable specific delivery contract by any party thereto without having to make or to receive actual delivery to or from the other party to the contract as to or from any other party named in the contract."

20. The contention on behalf of the plaintiffs has been that the contracts in question being non-transferable specific delivery contracts, section 15 has no application and therefore they are not illegal. But that contention is not acceptable.

21. The Act classifies " contracts " into ready delivery contracts and forward contracts. A ready delivery contract is defined in section 2 *(i)* as a contract which provides for the delivery of goods and the payment of a price therefor, either immediately or within such period not exceeding eleven days after the date of the contract. Section 2 *(c)* says a contract for the delivery of goods at a future date and which is not a ready delivery contract is a "forward contract". Forward contracts are further classified into specific delivery contracts and those which are not. "Specific delivery contract" is defined in section 2 *(m)* as a forward contract which provides for the actual delivery of specific qualities or types of goods during a specified future period at a price fixed thereby or to be fixed in the manner thereby agreed and in which the names of both the buyer and the seller are mentioned. Specific delivery contracts are further classified into two categories, namely non-transferable specific delivery contracts and transferable specific delivery contracts. Section 2 *(f)* defines 'non-transferable specific delivery contract' as a specific delivery contract, the rights or liabilities under which or under any delivery order, railway receipt, bill of lading, warehouse receipt or any other document of title relating thereto are not transferable. 'Transferable specific delivery contract' is defined in section 2 *(n)* as a specific delivery contract which is not a non-transferable specific delivery contract.

22. If the suit contracts are really non-transferable specific delivery contracts, then section 18 of the Act would be attracted and they would not be illegal under section 15, unless the proviso to section 18 becomes applicable. It was already noticed that admittedly there had been a notification published by the Central Government prohibiting forward contracts in 40s count yarn of Sri Meenakshi

Mills in Madurai. But such notification would not apply if the contracts are really non-transferable specific delivery contracts. No doubt the contracts in question are, in form, non-transferable specific delivery contracts but it is not disputed that the real nature of the contract has to be ascertained not merely by the letter of the contract but from all the surrounding circumstances. *Khardah Co. Ltd.* v. *Raymon & Co.*[1] and *Modi & Co.* v. *Union of India*[2], are cases where the question was whether the contracts were non-transferable specific delivery contracts as defined under the Act. The contracts themselves did not contain a clause prohibiting transfer, but their Lordships of the Supreme Court pointed out that in construing a contract it is legitimate to take into account the surrounding circumstances for ascertaining the intention of the parties and in those cases it was held that the contracts were really non-transferable specific delivery contracts. In the present cases, no doubt there is nothing to show that the forward contracts were transferable. But the question is whether they are really specific delivery contracts. In other words, whether the parties intended to give and take actual delivery of bales contracted for. From the evidence discussed earlier it is quite clear that the parties to the contracts in question had intended to take only the difference in price and they had not intended to give and take delivery of bales. But the evidence does not disclose a definite understanding between the parties to the contract (at the time of entering into the respective contracts that the buyer in no event should insist upon delivery. Therefore, I have said that the contracts would not amount to wager. That fact, namely, the contract not being wager would in no way help the plaintiffs in their contention that the exception contained in section 18 of the Act would be applicable. If the contracts are really non-transferable specific delivery contracts, the exception would operate. But eventhough the form of the contracts satisfied the requirements, if the real intention of the parties gathered from the surrounding circumstances is to take only the difference in price and not to perform the contracts by delivery, section 18 of the Act would not come into play. As in these cases, I hold that the parties did not intend actual delivery but intended only to take the difference in price (even though there is no proof of a definite mutual understanding that in no event the buyer should insist on delivery), the exception contained in section 18 is not attracted.

23. But that is not all. Assuming that the contracts are really non-transferable specific delivery contracts and section 18 of the Act applies, the further question would be whether the cases come under the proviso to that section. While section 18 is an exception to section 15, the proviso of section 18 (1) is in the nature of an exception to that exception. From the facts and circumstances it is quite obvious that the proviso to section 18 (1) applies to the present cases. The said proviso has already been extracted. The effect of the proviso is, no person shall organize or assist in organising or be a member of an unrecognised association which provides facilities for the performance of any non-transferable specific delivery contract without actual delivery. In other words, there is a prohibition for a person to either assist or organize or be a member of an unauthorised association which provides facilities for the performance of any non-transferable specific delivery contract without actual delivery. Chapter V of the Act provides for penalty and there is provision making an infringement of the prohibition an offence. It has been held by the Supreme Court in *State of Gujarat* v. *Manilal Joitaram*[1] that the prohibition is against persons arranging for avoidance of delivery through an unrecognised association and read with the penalty section it is clear that such acts are rendered illegal. Their Lordships of the Supreme Court further pointed out in that case that if the acts are illegal, then non-transferable specific delivery contracts by members of an unrecognised association also be illegal.

24. It is admitted that Madurai Yarn Merchants Association is not a recognised association as defined in section 2 (j)

1. (1963) 3 S.C.R. 183 : A.I.R. 1962 S.C. 1810.

2. (1968) 2 S.C.R. 565 : (1969) 1 S.C.J. 176 : A.I.R. 1969 S.C. 9.

1. (1968) 2 S.C.J. 184: (1968) M.L.J. (Crl.) 389 : (1968) 2 S.C.R. 177: A.I.R. 1968 S.C. 653.

of the Act, nor is it a registered association as defined in section 2 (jj) of the Act. It is admittedly an unauthorised association. But it is evident that it has been functioning as if it is a recognised association. The bye-laws of the Association have been exhibited. From the evidence on record there can really be no dispute that the Association had been providing facilities to its members to adjust the difference in price in respect of non-transferable specific delivery contracts. Admittedly all the parties to the suit as well as various other yarn merchants of Madurai were members of the said Association. The Association supplied the printed *pro forma* for its members for entering into non-transferable specific delivery contracts. The difference in price is that between the contract price and the price notified by the Association for the respective month, and not the market price. Admittedly, the contracts in question are in accordance with the relevant bye-laws of the Association and they are in the forms supplied by the Association. The members of the Association are to do business only through the broker or brokers that are certified by the Association. Disputes between members and brokers and members and non-members shall be decided by arbitration, and if any member or broker seeks the aid of the Court without the permission of the Committee, the Committee shall take disciplinary action against the member or the broker as the case may be. In most of the contracts between the parties as well as other merchants who were members of the Association, only difference in price as fixed by the Association was being adjusted. Under these circumstances, the proviso to section 18 (1) applies and as held by the Supreme Court in the case referred above, the contracts though non-transferable specific delivery contracts, being between members of an unrecognised association are illegal.

25. The result is, the appeals fail and they are dismissed, but under the circumstances of the case I make no order as to costs.

S.J. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Natarajan, J.*

Seethalakshmi Ammal and another .. *Appellants**

v.

Minor S. Ramesham (Rameshan) adopted S/o. Alwar alias **Rukmani Ammal and Srinivasa Iyenger through next friend and property guardian C.K.S. Ranganathan and others** .. *Respondents.*

(A) *Deed—Construction—Family arrangement—Essentials—Non-inclusion of a party—If family arrangement fails.*

(B) *Document not containing description of properties or schedule—Whether nullifies arrangement.*

A family arrangement can be effected between members of a famliy for a variety of reasons and not necessarily for settlement of disputes between them regarding the family property. There need not be a conflict of legal claims before a family arrangement can be effected. Even affection towards one of the members to a family arrangement may be a justifying factor for giving properties to him under the arrangement. It is not necessary that a dispute shall have actually arisen between the parties for the family settlement being effected. [*Paras.* 13, 14.]

A family arrangement stands on a peculiar footing and having regard to the purport of such an arrangement, Courts will more readily give assent to a *bona fide* family arrangement than avoid it. Considering the object of the family settlement, Courts have placed the settlements on such a high pedestal that they have gone to the extent of laying down that principles which apply to the case of an ordinary compromise between strangers do not equally apply to the case of compromises in the nature of family arrangements. Since there is no transfer of interest as envisaged by the Transfer of Property Act in a family arrangement, family arrangements can be arrived at orally. A memo-

* S.A. No. 425 of 1973 and Memo. of Cross objections, 22nd August, 1975.

randum of what had been agreed upon need not be prepared for the purpose of being used as a document on which the future title of the properties is to be founded. It cannot be said that the arrangement is in effective, when once it has been found that the arrangement had been *bona fide* entered into. [*Paras.* 15, 16.]

An instrument has to be read as a whole before the effect of the dispositive words contained therein is interpreted. A family arrangement will not fail because one of the parties thereto was not included in the deed of family arrangement. [*Paras.* 18, 19.]

The question as to whether identifiable properties have been given under an instrument is always one of fact and the answer in each case will necessarily depend upon the facts of the case. Where there is no room for uncertainty or ambiguity or vagueness, Courts have always held that the absence of a detailed description of the properties dealt with under the deed will not render the instrument nugatory. [*Para.* 20.]

Cases referred to :—

Sahu Madho Das and others v. *Pandit Mukand Ram and another,* (1955) 2 S.C.R. 22 : 1955 S.C.J. 417: (1955) 2 M.L.J. (S.C.) 1 : A.I.R. 1955 S.C. 481 ; *Ramayya* v. *Lakshmayya,* (1942) 2 M.L.J. 249: 69 I.A. 110: I.L.R. (1943) Mad. 1 : A.I.R. 1942 P.C. 54 ; *Kisto Chandra* v. *Anila Bala Dasi,* A.I.R. 1968 Pat. 487; *S.O. Kondama Naik* v. *Peria Dorasami,* (1901) 28 I.A. 46: I.L.R. 24 Mad. 377 ; *Durgaiah* v. *Commissioner of Gift Tax* (1972) 1 An.W.R. 206; *Pullaiah* v. *Narasimhan,* (1967) 1 S.C. J. 848: (1967) 2 An.W.R. (S.C.) 14 : (1967) 2 M.L.J. (S.C.) 14: A.I.R. 1966 S.C. 1836; *Shambhu Prasad* v. *Phool Kumari,* (1971) 2 S.C.J. 650: A.I.R. 1971 S.C. 1337; *Ram Charan* v. *Girja Nandini,* (1966) 1 S.C.J. 61 : (1965) 3 S.C.R. 841: A.I.R. 1966 S.C. 323; *Tek Bahadur* v. *Debi Singh,* (1966) 2 S.C.J. 290: A.I.R. 1966 S.C. 292; *Krishna Behari Lal* v. *Gulab Chand,* (1971) 1 S.C.J. 30: A.I.R. 1971 S.C. 1041; *Ramayammal* v. *Muthammal,* (1974) 2 M.L. J. 34: 87 L.W. 407: A.I.R. 1974 Mad. 321; *Jainulabdeen* v. *Pappathi,* I.L.R. (1968) 1 Mad. 477; *Mt. Hiran Bibi* v. *Mt. Sohan Bibi,* 27 M.L.J. 149: 24 I.C. 309: A.I.R. 1914 P.C. 44; *Venkatachalam* v. *Govindaswami,* 46 M.L.J. 288: A.I.R. 1924 Mad. 605; *Pasungilia Pillai* v. *Isakkimuthu Pillai,* A.I.R. 1928 Mad. 349 ; *Venkatasubramania* v. *Srinivasan,* A.I.R. 1929 Mad. 670 ; *Ramaswami* v. *Venkatammal,* 77 L.W. 691: I.L.R. (1965) 1 Mad. 41: A.I.R. 1965 Mad. 193; *Abiba Ali* v. *Alhaji Mama Ali,* 56 L.W. 1: 203 I.C 561: 76 Cal.L.J. 495: A.I.R. 1942 P.C. 69; *Krishna Beharilal* v. *Gulabchand,* (1971) 1 S.C.J. 30: A.I.R. 1971 S.C. 1041; *G. Geevarghese* v. *Issahak George,* A.I.R. 1971 Ker. 270; *M.C. Chacko* v. *State Bank, Travancore,* (1970) 1 S.C.J. 347: (1970) 1 S.C.R. 658 : A.I.R. 1970 S.C. 504; *Narasimha Nayanevaru* v. *Ramalinga Rao,* (1900) 10 M.L.J. 104; *Subbalakshmiammal* v. *Narasimhaiah,* (1927) 52 M.L.J. 482: 25 L.W. 563: A.I.R. 1927 Mad. 586.

Appeal against the decree of the Court of the Additional District Judge, Madurai in Appeal Suit No. 390 of 1972 preferred against the decree of the Court of the Subordinate Judge of Madurai in Original Suit No. 295 of 1970.

G. Ramaswami for *Manikandeswaran,* for Appellants.

P.S. Srisailam, for Respondent.

The Court delivered the following

JUDGMENT:—This is an appeal by defendants 2 and 3 against the judgment of the Additional District Judge of Madurai, in A.S. No. 390 of 1972, wherein he affirmed the judgment of the trial Court in all respects except as regards the declaration of title and delivery of possession of item No. 24 of the suit properties. The plaintiff has filed a memorandum of cross objections to get relief in respect of item No. 24 also.

2. The genesis of this unfortunate litigation between close relations was the posthumous adoption of the plaintiff as the son of the Srinivasa Iyengar who died on 6th September, 1961. Srinivasa Iyengar had no surviving male issue and had only three daughters of whom, the third respondent was the second, the other two being the appellants herein. It would appear that Srinivasa Iyengar was desirous of adopting the plaintiff even during his

lifetime, but the parents of the plaintiff were initially reluctant to give the boy in adoption, for at that time, they had no other male issue besides the plaintiff. However, they were blessed with a second boy on 9th December, 1960 and thereafter they were willing to give the plaintiff in adoption, but due to the intervening illness of Srinivasa Iyengar, the ceremony of adoption was postponed and eventually remained unaccomplished due to the death of Srinivasa Iyengar. It was thereafter *i.e.*, on the thirteenth day of the funeral ceremony of Srinivasa Iyengar, when *Subhasweekarnam* was performed, Srinivasa Iyengar's wife who was the first defendant in the suit and who died during the pendency of the suit, in deference to the wishes of her husband, took the plaintiff in adoption on 18th September, 1961. The adoption was done in accordance with Sastraic rites and rituals and, in addition a registered deed of adoption, Exhibit B-1 was also brought forth. The adoption ceremony was followed by a family arrangement which resulted in certain properties of Srinivasa Iyengar being allotted to the plaintiff the allotment however, being burdened with the obligation that the plaintiff should discharge certain debts, secured and unsecured, incurred by Srinivasa Iyengar. The remaining properties of Srinivasa Iyengar as well as the properties belonging to his wife were divided equally among his three daughters, but during the lifetime of Srinivasa Iyengar's wife, she was permitted to enjoy the income from those properties. Like the adoption itself, the family arrangement was also reduced to writing and a registered instrument, Exhibit B-2, was also brought into existence on 18th September, 1961.

3. For about eight or nine years, things went on smoothly, and the plaintiff was recognised and treated as the adopted son of Srinivasa Iyengar. The family arrangement was given effect to and there was mutation of names in the registers in respect of the items of properties allotted to the plaintiff and others, and the debts of Srinivasa Iyengar were also being discharged in accordance with the family arrangement. Misunderstandings, however, seem to have cropped up in or about the year 1970, with the result that the appellants and their mother went back upon the adoption and the family arrangement and began to assert title in themselves on the items of properties which had been given to the plaintiff in the family arrangement. They purported to effect a fresh partition among themselves and the plaintiff's mother and it was at this stage of events, the plaintiff, represented by his natural father, who obtained permission from Court to act as the personal and property guardian of the plaintiff, filed the suit in O.S. No. 295 of 1970 on the file of the Second Additional Subordinate Judge, Madurai for reliefs of declaration of title to plaint Schedule I properties, delivery of possession of the same and for accounts and mesne profits.

4. The case of the plaintiff was that he had been validly adopted as the son of Srinivasa Iyengar that in pursuance of the adoption he was allotted the Schedule I properties at the family arrangement which followed the adoption and that the attempt of defendants 1 to 3 to nullify the settled state of affairs was morally and legally untenable. To the suit were impleaded, as *pro forma* parties, defendants 4 and 5 the fourth defendant being a lessee in whose favour the contesting defendants had created a lease and the fifth defendant being the mother of the plaintiff himself.

5. Defendants 1 to 3, who were the principal contestants repudiated the adoption of the plaintiff as Srinivasa Iyengar's son and further contended that even if any ceremony of adoption had been performed, it was invalid and inoperative. With regard to the family arrangement their stand was that there was no such arrangement at all and the deed of family arrangement was of no consequence as it had been brought about by the plaintiff's natural father, by fraud, deception and undue influence. Certain pleas based on legal grounds were also projected, to assail the family arrangement. These were rested on the ground that the plaintiff was not a member of the family and had no semblance of a right to be included in the partition of the properties of Srinivasa Iyengar, that in any event, the properties of Srinivasa Iyengar had already vested in his wife and daughters prior to the

alleged ceremony of adoption and as such, there cannot be any divesting of vested properties.

6. The trial Court, on an analysis of the evidence, oral and documentary, adduced in the case, came to the conclusion that the adoption of the plaintiff as the son of Srinivasa Iyengar was not only true but was also valid and further held that the family arrangement was equally a true and binding transaction and consequently, the plaintiff was entitled to the reliefs asked for in the suit. In the appeal preferred by the defendants 2 and 3, the learned Additional District Judge of Madurai concurred with the findings and conclusion of the trial Court and affirmed the judgment appealed against but due to a misconception that the plaint item No. 24 was not included in the items of land allotted to the plaintiff, he allowed the appeal only in so far as that item is concerned. It is against the affirming judgment of the lower appellate Court, the appellants have now come forward with this second appeal.

7. Mr. G. Ramaswami, learned counsel for the appellants, attempted to assail the findings of the Courts below on the question of adoption, but I do not think the factum or validity of the adoption is open to question any longer. Both the Courts below have on an analysis and appreciation of the evidence, clearly found that the plaintiff was undoubtedly adopted as the son of Srinivasa Iyengar on 18th September, 1961 and the adoption satisfied the requirements of law in all respects. Against the concurrent finding of the Courts below, which is one on facts, this Court will not interfere unless it is established that the finding is perverse or that it is vitiated by any error of law. There is overwhelming evidence in the case to show that the plaintiff was adopted by the first defendant as the son of Srinivasa Iyengar and the adoption was in accordance with the wishes of Srinivasa Iyengar himself and had the approval of all the members of the family. The adoption itself is evidenced by a registered deed, Exhibit B-1, which among others, has been signed by defendants 1 to 3 and the third defendant's husband who has been examined as D.W. 4. Photos, Exhibits A-17 to A-19, taken at the time of the adoption ceremony also lend credence to the plaintiff's case. The plaintiff's name had been changed from that of Varadaraj *alias* Ramesh to that of Ramaseshan, pursuant to the adoption. In suits instituted by her as well as in suits instituted against her by third parties, the first defendant had acted as the adoptive mother and guardian of the plaintiff. Even so with reference to promissory notes executed after the adoption ceremony, the first defendant had purported to execute the documents as the adoptive mother and guardian of the plaintiff. The plaintiff's name had been substituted as the successor to Srinivasa Iyengar for performance of Mandakapadi for Kalla Azhagar. The plaintiff had been admitted to school by the first defendant and in the application form she had described herself as the mother and guardian of the plaintiff. In the light of such preponderant evidence, the appellants do not have the ghost of a chance to contend that the finding of the Courts below that the adoption was true and valid is a perverse one. Mr. G. Ramaswami is not also able to show that the adoption is not in accordance with law in any manner. Consequently the scope of the appeal will have to be restricted only to the attack on the family arrangement pleaded by the plaintiff.

8. With regard to the family arrangement, the appellants, besides, raising legal objections, also raised a plea before the Courts below that no such arrangement as set out by the plaintiff was forged among the members of the family and Exhibit B-2 itself had been brought into existence by fraud and deception. They contended that the plaintiff's natural father was a scheming man and he had obtained the signatures of defendants 1 to 3 in Exhibit B-2 by misrepresenting that such a document was required for the management of the properties. This contention was repelled by the trial Court as well as the lower appellate Court, and rightly too, for, there are numerous factors to show that Exhibit B-2 had been executed by the parties thereto and attested by witnesses including the husband of the third defendant with full knowledge of the

contents thereof. In any event, the finding in this behalf by the Courts below is one of fact and cannot therefore be traversed once again in second appeal. Fully aware of this position, Mr. G. Ramaswami's vigorous attempt in the appeal was to nullify the family arrangement on several legal grounds.

9. The first contention of Mr. G. Ramaswami was that, however, liberally and sympathetically Courts may construe a family arrangement yet the arrangment should satisfy certain basic tests and reflect certain essential features. Dilating his arguments on this aspect, the learned counsel would contend that a party to a family arrangement must not only show that he was a member of the family, but that he had some antecedent title or at least a semblance of title in the properties covered by the family arrangement and there must be the possibility of a dispute, however remote it may be, between the parties to the arrangement in respect of the properties of the family. According to the appellant's counsel, some antecedence of title is an indispensable prerequisite before ever a party could be admitted to a family arrangement and given property. On the basis of this stand, it was pointed out that though the plaintiff may have become a member of the family of Srinivasa Iyengar by virtue of the adoption, he can by no stretch of imagination be deemed to have had any antecedent title in, or a semblance of right to the properties of Srinivasa Iyengar and therefore, he cannot lay claim to any property on the basis of the family arrangement. To show that the adoption, by itself, will not entitle the plaintiff to claim a share in the properties of Srinivasa Iyengar, the appellants place reliance on section 12 of the Hindu Adoptions and Maintenance Act (LXXVIII of 1956), which lays down that an adopted child shall be deemed to be the child of his adoptive parents only with effect from the date of the adoption. It may be recalled that the plaintiff's adoption was done only thirteen days after the death of Srinivasa Iyengar and consequently, the plaintiff can be held to have become a member of the adoptive family only from the date of adoption, *viz.*, 18th September, 1961. Section 12 (c) of the Act referred to above lays down that the adopted child shall not divest any person of any estate which vested in him or her before the adoption. It therefore follows that the estate of Srinivasa Iyengar which on his death, vested immediately on his widow and daughters, cannot be divested by the plaintiff solely by reason of his adoption. The appellants would, therefore, contend that, notwithstanding the adoption of the plaintiff, he was no better than a stranger and therefore was not entitled to claim rights in the properties of the family under the guise of a family arrangement, and, if at all any family property is to be given to him, it can only be by means of a regular conveyance deed as known to law.

10. Another ground of attack on Exhibit B-2 was that at the time it came into existence, there were no disputes which required settlement among the members of the family and in the absence of a dispute there can be no valid family arrangement. Mr. Ramaswami pointed out that the execution of Exhibit B-2 was in close succession to the execution of Exhibit B-1 and in the fractional interregnum between the execution of the two documents, a real and *bona fide* dispute among the family members could not have cropped up to give rise to a family arrangement. In support of these propositions, Mr. Ramaswami placed reliance on the following decisions. The Supreme Court in *Sahu Madho Das and others* v. *Pandit Mukand Ram and another*[1] observed as follows:

"It is well settled that a compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the right of the others, as they had previously asserted it, to the portions allotted to them respectively. That explains why no conveyance is required in this case to pass the title from the one in whom it resides to the person receiving it under the family arrangement.

1. 1955 S.C.J. 417: (1955) 2 M.L.J. (S.C) 1: (1955) 2 S.C.R. 22: A.I.R. 1955 S.C. 481.

It is assumed that the title claimed by the person receiving the property under the family arrangement had always resided in him or her so far as the property falling to his share or her share is concerned and therefore, no conveyance is necessary. But in our opinion, the principle can be carried further and so strongly do the Courts lean in favour of family arrangements that bring about harmony in a family and do justice to its various members to avoid, in anticipation, future disputes which might ruin them all, that we have no hesitation in taking the next step (fraud apart) and upholding an arrangement under which one set of members abandons all claims to all title and interest in all the properties in dispute and acknowledges that the sole and absolute title to all the properties resides in only one of their number (Provided he or she had claimed the whole and made such an assertion of title and are content to take such properties as were assigned to their shares as gifts pure and simple from him or her, or as a conveyance for consideration when consideration is present.

......But in that event, the formalities of law about the passing of title by transfer would have to be observed and now, either registration or twelve years' adverse possession would be necessary."

This ratio is heavily relied on to contend that since the plaintiff had no semblance of an antecedent title to the properties in question, any transfer of properties to him under the projected family arrangement can be effected only by means of a gift or sale, and in either event, it must be evidenced by a registered conveyance deed. Reliance was also placed on *Ramayya v. Lakshmayya*[1], where it was held that where it had not been shown that a party to an arrangement had any competing title of his own in respect of the properties in dispute, there can be no basis for a family settlement between the parties. Yet another case cited in this behalf in *Kisto Chandra* v. *Anila Bala Dasi*[2], which, following the decision in *Sahu Mado Das and others* v. *Pandit Makand Ram and another*[1], held that a family arrangement is based on the assumption that there is an antecedent title of some sort in the parties. It further held that since the basis of a family settlement is the existence of doubtful claims or semblance of claims of the parties concerned in respect of the properties in dispute, the anticipated dispute must be real and not imaginary. It was also observed therein that a transaction cannot be a family settlement simply because a party chose to call it so. On the assumption that Exhibit B-2, in so far as it relates to the plaintiff can only be construed as a conveyance deed, and not a compromise deed among the family members having right over the properties dealt with under the arrangement the appellants' counsel relied on *Immudipattam Thirugnana S.O. Kondama Naik* v. *Peria Dorasami*[2] where the Privy Council held that an arzi addressed and a statement given in pursuance thereof to the Collector for effecting a transfer of the mortgaged property by mutation of names in the registers in favour of the mortgagee cannot be construed as document relating to a family arrangement for the mortgagee was not a member of the family and any transfer of property to the mortgagee could only be effected in accordance with the provisions of the Transfer of Property Act. My attenion was also invited to *Durgaiah* v. *Commissioner of Gift-tax*[3], where a settlement deed executed by a father in favour of his children was refused recognition as a family arrangement on the ground that it did not reflect an agreement arrived at between members of a joint family who wished to avoid any plausible or possible disputes and wanted to secure peace and harmony amongst the members as well as claims in relation to properties, but on the other hand, the document was nothing more than a simple settlement or gift executed by the father in respect of his self-acquired properties in favour of his children out of love and affection. Closely linked with

1. (1942) 2 M.L.J. 249: 69 I.A. 110 : I.L.R. (1943) Mad. 1: A.I.R. 1942 P.C. 54.
2. A.I.R. 1968 Pat. 487.

1. 1955 S.C.J. 417 : (1955) 2 S.C.R. 22 : A.I.R. 1955 S.C. 481.
2. (1901) 28 I.A. 46 : I.L.R. 24 Mad. 377.
3. (1972) 1 An.W.R. 206.

this argument is the futher contention that the plaintiff himself was not an *eo nomine* party to Exhibit B-2 and on that ground too, he cannot lay claim to the suit properties on the basis of Exhibit B-2.

11. Before dealing with the contention of Mr. G. Ramaswami, it would be useful to refer to the form and content of Exhibit B-2. As already stated, it is a registered instrument and is styled as a family arrangement settlement deed and the properties dealt with thereunder have been valued at Rs. 16,000. Srinivasa Iyengar's widow and daughters, *viz*., defendants 1 to 3 and 5, are the parties to the instrument. It makes reference to the death of Srinivasa Iyengar on 6th September, 1961 and his having left 10 acres of wet land, a vacant site, a terraced house, cash of Rs. 10,000 a share in a coconut tope and by way of liability a secured debt for Rs. 4,000 and promissory note debts for Rs. 18,000. Reference is then made to the taking in adoption of the plaintiff. The allotment of properties to the plaintiff and the parties to the document is in the following words :

"ஷை எஸ். ஸ்ரீனிவாசய்யங்கார் எஸ்டேட் சொத்துக்களில் 7 ஏக்கர் நஞ்சையும் ஷை பிறவை கொண்டமாரிய் தென்னந்தோப்பில் எங்களுக்குண்டான பாத்தியத்தையும் ஷையாரால் எங்களுக்கு ஏற்பட்ட கடன்களையும் ஷை சுவீகாரப் பையனுடைய சௌகரியத்திற்காக ஒதுக்கப்பட்டிருப்பது போக பாக்கி உள்ளதும் நிர்விலங்கமாயும் இருக்கப்பட்ட மூன்று ஏக்கர் நஞ்சையும் ஷை 1வது நபர் தன் பேரால் கிரையம் பெற்ற மூன்று ஏக்கர் நஞ்சையும் நாம் அனுபவித்தக் கொள்ளவேண்டிய ஏற்பாடுகளை துவக்க இந்த செட்டில்மெண்டு சாஸனம் எழுதிக்கொண்டிருக்கிறோம்."

"அடியில் கண்ட சொத்துக்கள் பூராவும் நம்மில் 1-வது நபர் தன் ஆயுள் வரை எந்தவித பந்தபராதீனம் செய்ய பாத்திய மன்னியில் அவைகளில் வரப்பெற்ற மகசூல் வருமானங்களிலிருந்து சர்க்கார் தீர்வை மருமத்து சிலவுகள் வகையறுப் போக மீதி வருமானங்களை தன்னிஷ்டம் போல் அனுபவித்து வந்து அவள் ஜீவதிசைக்குப் பின்பு அடியில் கண்ட ஏ. பி. சி. ஷெடியூலில் கண்ட சொத்துக்களை அவரவர்களும் அவாள் வாரிசுகளும் சர்வ சுதந்திர பாத்தியமாய் தானாதி வினிமய விக்கிரியங்களுக்கு யோக்கியமாய் ஆண்டனுபவித்துக்கொள்ள வேண்டியது."

From this it may be seen that 7 acres of wet lands and the share in the Kondamari coconut tope were set apart for the adopted son of Srinivasa Iyengar *viz*., the plaintiff and he was also responsible for the discharge of the secured and unsecured debts incurred by Srinivasa Iyengar. The remaining 3 acres of wet lands of Srinivasa Iyengar and the 3 acres of land his widow was entitled to, were to vest in the three daughters but be enjoyed by the widow during her life-time without power of alienation and thereafter taken by the three daughters in accordance with the A, B and C Schedules.

12. Mr. Srisailam, learned counsel for the plaintiff-respondent refuted every one of the contentions of the appellant's counsel and urged that Exhibit B-2 satisfied all the requirements of law for being construed as a family arrangement and the attempt of the appellants to get over the document was futile. While he conceded that a stranger cannot be admitted to any benefit under a family arrangement, Mr. Srisailam pointed out that after what all had happened, it would be nothing but monstrous for the appellants to brand the adopted son of Srinivasa Iyengar as a stranger or a third party to the family and not entitled to rely upon the family arrangement for claiming title to the suit properties. Various decisions were cited by the learned counsel to fortify his contention that for recognising a family arrangement a party need not establish that he had an undisputed and enforceable right over some or all items of the family properties, that a dispute *in praesenti* existed prior to the family arrangement and that section 12 of the Hindu Adoptions and Maintenance Act, would have no application to the facts of the case because the plaintiff's claim to the suit properties was not founded on the adoption simpliciter but on the further fact that there was a family arrangement among the parties to the litigation.

13. It is by now well established that a family arrangement can be effected bet-

ween members of the family for a variety of reasons and not necessarily for settlement of disputes between them regarding the family properties. Likewise, it is no more open to anyone to contend that there should be a conflict of legal claims before a family arrangement can be effected. In support of the former proposition, I may only refer to some of the authorities cited by Mr. Srisailam. Subba Rao J. (as he then was), pointed out in *Pullaiah* v. *Narasimhan*[1] that members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into a family arrangement. In *Shambhu Prasad* v. *Phool Kumari*[2], it was pointed out that a family arrangement has to be considered as a whole for ascertaining whether it was made to allay disputes, existing or apprehended, in the interest of harmony in the family or the preservation of property. In fact, the Courts have gone so far as to say that even affection towards one of the members to a family arrangement may be a justifying factor for giving properties to him under the arrangement. This may be seen from the following expression of the Supreme Court in *Ram Charan* v. *Girija Nandini*[3]. "All that is necessary is that the parties must be related to one another in some way and have a possible claim to the property or a claim or even a semblance of a claim on some other ground as, say, affection". In support of the second propossition the following decisions can be usefully referred to. In *Pullaiah* v. *Narasimhan*[1] and *Shambhu Prasad* v. *Phool Kumari*[2], it was held as follows:

> "Although conflict of legal claims *in praesenti* or in future is generally a condition for the validity of family arrangements, it is not necessarily so. Even, *bona fide* disputes, present and possible which may not involve legal claims, would be sufficient."

The passage in *Sahu Madho Das and others* v. *Pandit Mukand Ram and another*[1], referring to a family arrangement proceeding on the assumption that there is an antecedent title of some sort in the parties and the need for a registered conveyance deed where parties to a family arrangement acknowledge the sole title of one of the parties to the family arrangement and take such property from him as assigned to them as gift or conveyance, has been explained in *Tek Bahadur* v. *Debi Singh*[2], in the following words:

> "These observations apply to a case where one of the parties claimed the entire property and such claim was admitted by the others and the others obtained property from the recognised owner by way of gift or by way of conveyance. In the context of the document setting these facts this court held the real position to be that the persons obtaining the property from the sole owner derived title to the property from the recognised sole owner and such a document would have to satisfy the various formalities of law about the passing of title by transfer."

In the instant case, it is not the stand of anyone that the plaintiff or any one acting on his behalf acknowledged either explictly or by necessary implication, the exclusive title of the widow and daughters of Srinivasa Iyengar to the family properties and then received properties from these persons by way of gift or sale. In *Ram Charan* v. *Girija Nandini*[3], and *Krishna Behari Lal* v. *Gulab Chand*[4], the Supreme Court construed how the word "family" in the context of a family arrangement is to be understood. The Supreme Court laid down as follows:

> "The word 'family' in the context of a family arrangement is not to be understood, in a narrow sense of being a group of persons who are recognised in law as having a right of succession or having a claim to a share in a property,

1. (1967) 1 S.C.J. 848: (1967) 2 An.W.R. (S.C.) 14: (1967) 2 M.L.J. (S.C.) 14: A.I.R. 1966 S.C. 1836.
2. (1971) 2 S.C.J. 650: A.I.R. 1971 S.C. 1337.
3. (1966) 1 S.C.J. 61: (1965) 3 S.C.R. 841: A.I.R. 1966 S.C. 323 at 329.

1. 1955 S.C.J. 417: (1955) 2 M.L.J. (S.C.) 1: (1955) 2 S.C.R. 22: A.I.R. 1955 S.C. 481.
2. (1966) 2 S.C.J. 290: A.I.R. 1966 S.C. 292.
3. (1966) 1 S.C.J. 61: (1965) 3 S.C.R. 841: A.I.R. 1966 S.C. 323 at 329.
4. (1971) 1 S.C.J. 30: A.I.R. 1971 S.C. 1041.

in dispute. If the dispute which is settled is one between near relations, then the settlement of such a dispute can be considered as a family arrangement."

Ramanujam, J., held in *Ramayammal* v. *Muthammal*[1], that a party who takes the benefit of a family settlement need not necessarily be shown to have under the law, a share of the property and it would be enough that the parties are related to each other in some way and have a possible claim to the property or even a semblance of a claim of some sort or other.

14. In the light of these decisions, I do not think the appellants can contend that the plaintiff cannot claim any benefit under the family arrangement on the ground that he did not have a subsisting title in the properties of the family at the time of the family arrangement was effected under Exhibit B-2. When the plaintiff was adopted as the son of Srinivasa Iyengar, it could not have been solely for his performing religious ceremonies for the bliss of Srinivasa Iyengar's soul without the plaintiff getting any material benefit whatever from out of the adoption. Undoubtedly as a member of the adoptive family the plaintiff acquired a status and certain rights and, it is inconceivable that he would not have asserted his right to get some property if none had been given to him by the defendants. There was, therefore, a very strong probability, after the adoption, of disputes arising between the plaintiff on the one hand and defendants 1 to 3 on the other in the matter of sharing of properties and the plaintiff going to Court to secure some property for himself. In order to avert such a dispute, the parties may have deemed it necessary to effect a family settlement. As has been pointed out in some of the decisions referred to above, it is not necessary that a dispute should have actually arisen between the parties for the family settlement being effected. Even otherwise, it must be noted that properties may have been given to the plaintiff by the parties to Exhibit B-2 from out of love and affection for him and in consideration of his leaving his natural family and becoming a member of the adoptive family, or out of considerations for the honour of the family or formality and cordial relationship between the members of the family.

15. In so far as the contention of the appellants about the properties given to the plaintiff being in the nature of a gift and therefore warranting a gift deed with all its concomitants is concerned the contention overlooks the fact that the plaintiff was a member of the family and not a stranger at the time of the family arrangement and the normal requirements for transfer of property under the laws of transfer, would not be attracted to giving and taking of properties under a family arrangement. It is by now well established that a family arrangement stands on a peculiar footing and having regard to the purport of such an arrangement, Courts will more readily give assent to a *bona fide* family arrangement than to avoid it. Considering the object of family settlements, Courts have placed the settlements on such a high pedestal that they have gone to the extent of laying down that principles which apply to the case of an ordinary compromise between strangers do not equally apply to the case of compromises in the nature of family arrangements (vide *Pulliah* v. *Narasimhan*[1]), and in certain cases, even the personal law governing the parties cannot trammel family arrangements validly arrived at (vide *Jainulabdeen* v. *Pappathi*[2]), where Ramamurthi, J., held that the rule of Mohamedan Law against creation of a life estate and vested remainder would have no application to a family settlement. Since there is no transfer of interest as envisaged by the Transfer of Property Act in a family arrangement, the Courts for long have held that family arrangements can be arrived at orally and a memorandum of what had been agreed upon need not be prepared for the purpose of being used as a document on which future title of the parties is to be founded. Quoting with approval the view of the Privy Council in *Mt. Hiran Bibi* v. *Mt. Sohan Bibi*[3], the Supreme Court pointed

1. (1974) 2 M.L.J. 34: 87 L.W. 407: A.I.R. 1974 Mad. 321.

1. (1967) 1 S.C.J. 848: A.I.R. 1966 S.C. 1836.
2. I.L.R. (1968) 1 Mad. 477.
3. 27 M.L.J. 149: 24 I.C. 309: A.I.R. 1914 P.C. 44.

out in *Ram Charan* v. *Girija Nandini*[1], that a compromise by way of family settlement is in no sense, an alienation of family property. Consequently the setting apart of properties to the plaintiff under Exhibit B-2 was in recognition of his status and right as a member of the family and one entitled to participate in the family arrangement. It must therefore, necessarily follow that no transfer of properties as visualised under the Transfer of Property Act was effected in his favour and therefore, Exhibit B-2 cannot be said to suffer from infirmities as it does not satisfy the requirements of a gift-deed or sale-deed.

16. From another angle also Mr. G. Ramaswami, disputed the validity of Exhibit B-2 and his contention was that since Exhibit B-2 was in the nature of a contract, it should satisfy the test of mutuality, but in this case that factor was absent and on the other hand, the arrangement was positively disadvantageous to the appellants. The learned counsel pointed out that the widow as well as the three daughters of Srinivasa Iyengar would each be entitled to an one-fourth share in the properties of the deceased and would therefore have got 2½ acres each besides an one-fourth share in the coconut tope, whereas the daughters were each given only one acre of land in the properties left by Srinivasa Iyengar. Reference was made to the expression in *Pullaiah* v. *Narasimhan*[2], that Courts will give assent to family arrangement only if the arrangement to found to have been entered into *bona fide* and the terms thereof are fair to the parties. He would go to the extent of contending that the appellants had executed Exhibit B-2 without being aware of their rights in the properties left by Srinivasa Iyengar. This argument contains two fallacies in it. In the first instance the contention is factually incorrect, for the test of fairness will depend upon the circumstances of each case. It is no doubt, true that if properties had not been given to the plaintiff, the three daughters as well as the widow of Srinivasa Iyengar would each get 2½ acres of wet land and also an one-fourth share in the interest which Srinivasa Iyengar had in the coconut tope. But it must however, be remembered that Srinivasa Iyengar had also left debts amounting to Rs. 22,000 at the time of his death. Therefore, the persons taking his estate would have to discharge the liabilities left by him and each sharer would have, therefore, to pay at least Rs. 5,500 to discharge each one's share of the debt. As per the family arrangement the sole responsibility of discharging the debts was cast on the plaintiff and therefore, the appellants as well as their sister and mother took the properties given to them free of any liability. Apart from that, the three daughters have each been given one acre of land belonging to their mother even during her life time. For all that we know the three daughters may not have got any share in the mother's property but for the family arrangement. On account of these factors the appellants cannot be heard to say that Exhibit B-2 fails to satisfy the test of mutuality and is therefore not enforceable. The second fallacy in the argument referred to above is that normal tests based on technicalities like mutuality etc., are not applied to family arrangements. This is clearly brought out by the Supreme Court in *Pullaiah* v. *Narasimhan*[1] approving the passage occurring in Kerr on Fraud page 364 which is as follows: "Family arrangements are governed by a special equity peculiar to themselves and will be enforced if honestly made, although they have not been meant as a compromise but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually depend." Therefore, even assuming for argument's sake, that the appellants had entered into the family arrangement without being aware of their entitlement to an one-fourth share in the properties of their father, it cannot be said that the arrangement is ineffective, when once it has been found that the arrangement had been *bona fide* entered into.

17. Closely linked with the contention that the appellants had not been given a fair deal in the family arrangement, Mr. Ramaswami propounded a proposi-

1. (1966) 1 S.C.J. 61 : A.I.R. 1966 S.C. 323 at 329.
2. (1967) 1 S.C.J. 848 : A.I.R. 1966 S.C. 1836.

1. (1967) 1 S.C.J. 848 : A.I.R. 1966 S.C. 1836.

tion that Exhibit B-2 was more akin to a Will than a deed of family arrangement and therefore, the appellants cannot be deemed to have derived any advantage under the arrangement. It may be remembered that though the daughters of Srinivasa Iyengar were each given two acres of land, the deed provided that the first defendant was to enjoy the A.B. and C schedule properties during her life-time and enjoy the income therefrom and after her life-time the three daughters were to take the properties in accordance with the schedules, Mr. Ramaswami's contention was that there was no immediate vesting of the A.B and C schedule properties in the three daughters and their right to the land would materialise only after the death of the first defendant and therefore, Exhibit B-2 was nothing more than a Will. To fortify this contention, the learned counsel placed reliance on *Venkatachalam* v. *Govindaswami*[1], where a deed of gift which did not dispose of any immediate interest in property was held to be nothing but a Will. This authority has no relevancy to the facts of the case, for, the view expressed therein was with reference to the contents of the document relied on in that case. In the instant case it may be seen that each of the three daughters was not only given one acre of land from out of their father's properties, but was also given one acre of land in the properties of the first defendant and in respect of the latter lands, there was an immediate vesting in each of the three daughters and there is nothing to show that the vesting was postponed beyond the death of the first defendant. Moreover, the first defendant had not reserved for herself any power of revocation of the settlement. It would therefore, be futile for the appellants to contend that Exhibit B-2 was in the nature of a Will and the family arrangement did not therefore confer any benefit to the appellants. As pointed out in *Pasungilia Pillai* v. *Isakkimuthu Pillai*[2] a disposition *in praesenti* can be made vesting property in the third person on the death of the maker of the instrument and such a document cannot be construed as a Will. Similarly in *Venkatasubramani* v. *Srinivasa*[1], a document executed by a mother in favour of her son with reservation that the mother would enjoy the income from the properties during her life-time without any power of alienation was held to be a settlement and not a Will. A Bench of this Court held in *Ramaswami* v. *Venkatammal*[2] that the extent of rights obtained by a party should be determined on a true construction of the document and sometimes even a partition deed may take the form of a family arrangement whereunder benefits might be conferred, not merely on the immediate parties to the partition, but on other persons as well. It was also observed in that case that even where a bequest of property was dependent upon a contingency it would not necessarily prevent vesting of the estate till the contingency happened. In those circumstances, the contention of the appellants in this behalf must necessarily fail.

18. Another ground of attack, by the appellants, on the family arrangement as reflected in Exhibit B-2 was that Exhibit B-2 did not contain the requisite dispositive words to show that 7 acres of wet lands and the share in the coconut tope had been given to the plaintiff absolutely. It may be remembered that Exhibit B-2 only mentions that 7 acres of land and a share in the Kondamari coconut tope have been set apart for the welfare of the adopted son. The contention of Mr. Ramaswami was that these words cannot be construed as conferring an absolute title on the plaintiff in respect of the suit properties, and, therefore, the plaintiff cannot claim title to the suit properties on the basis of Exhibit B-2. This argument cannot be sustained, for, it is based on a wrong premise *viz.*, that in a family arrangement there is a conveyance *inter se* between the parties to the arrangement. Even otherwise it is by now well settled that an instrument has to be read as a whole before the effect of the dispositive words contained therein is interpreted. Viewed in that perspective, there can be no doubt that what the par-

1. 46 M.L.J. 288 : A.I.R. 1924 Mad. 605.
2. A.I.R. 1928 Mad. 349.

1. A.I.R. 1929 Mad. 670.
2. 77 L.W. 691 : I.L.R. (1965) 1 Mad. 41 : A.I.R. 1965 Mad. 193.

ties intended when they executed Exhibit B-2 was that the properties, *viz.*, 7 acres of land and the share in the coconut tope were to be taken absolutely by the plaintiff in pursuance of the family arrangement. That such an interpretation of the words 'set apart' contained in Exhibit B-2, is completely in accordance with judicial view, can be seen from the decisions rendered in the following cases: In *Abiba Ali* v. *Alhaji Mama Ali*[1], the Privy Council construed the words "I leave in charge of" as equivalent to "I devise absolutely to." In *Krishna Beharilal* v. *Gulabchand*[2], it was held that the words "*Malik Mustakil*" would justify the drawing of the inference that the estate had been given absolutely. Mr. Krishna Iyer, J. (as he then was) stated as follows in *G. Geevarghese* v. *Issahak George*[3]: "Where there is no total lack of necessary words of disposition but the words of vesting are not clearly written in a deed, the deed will not fail because in case of marginal doubt validation is the rule of law.

19. A further ground of attack on Exhibit B-2 was that the plaintiff was not an *eo nomine* party to the arrangement and at the same time could not repudiate the liability imposed on him therein. No doubt the plaintiff, who was then a minor, had not been made *eo nomine* party to Exhibit B-2. But on that score, the appellants cannot be heard to say that the family arrangement must fall through. The first defendant who was the adoptive mother of the plaintiff was a party to Exhibit B-2 and therefore, it must be construed that she had validly and effectively represented the minor plaintiff in the family arrangement. A contention, as the one now put forward, *viz.*, that a family arrangement must fail because one of the parties thereto was not included in the deed of family arrangement was urged before the Supreme Court in *Tek Bahadur* v. *Debi Singh*[4], but the Supreme Court repelled the contention and upheld the family arrangement. Mr. Ramaswami placed reliance on *M. C. Chacko* v. *State Bank, Travancore*[1], to contend that a person who is not a party to a contract (in the instant case, the plaintiff) cannot enforce the terms of the contract. The decision has no application to the facts of the present case, and in any event, in that very decision, it was pointed out that the rule of bar of suit by strangers to a contract would not apply to family arrangement.

20. The last ground of attack on Exhibit B-2 was that the document was vague inasmuch as it did not contain a schedule or description of the properties given to the plaintiff in the family arrangement. Exhibit B-2 merely says that out of the estate of Srinivasa Iyengar, 7 acres of nanja land and the right in the coconut tope were being given to the plaintiff and there is no reference to survey numbers or boundaries of the lands. This factor, however, cannot nullify the family arrangement of the deed evidencing it. The parties themselves understood what were the lands set apart for the plaintiff and mutation of the names in the revenue registers had subsequently been effected in accordance with the family arrangement. Even otherwise, Schedules A, B and C in Exhibit B-2 contained a description of the properties given to the three daughters and by a simple process of elimination even a third-party can find out, by reference to title deeds and records, what were the lands given to the plaintiff in the family arrangement. The question as to whether identifiable properties have been given under an instrument is always one of fact and the answer in each case will necessarily depend upon the facts of the case. Where there is no room for uncertainty or ambiguity or vagueness, Courts have always held that the absence of a detailed description of the properties dealt with under a deed will not render the instrument nugatory. As early as in *Narasimha Nayanevaru* v. *Ramalingama Rao*[2], a Bench of this Court held that the description of the properties dealt with by a document for purposes of the Regis-

1. 56 L.W. 1 : 203 I.C. 561 : 76 Cal.L.J. 495 : A.I.R. 1942 P.C. 69.
2. (1971) 1 S.C.J. 30 : A.I.R. 1971 S.C. 1041.
3. A.I.R. 1971 Ker. 270.
4. (1966) 2 S.C.J. 290 : A.I.R. 1966 S.C. 292.

1. (1970) 1 S.C.J. 347 : (1970) 1 S.C.R. 658 : A.I.R. 1970 S.C. 504.
2. (1900) 10 M.L.J. 104.

-tration Act, need not be local and it would be enough if the description be such as to clearly identify the properties referred to by the instrument. It was observed therein that it would be enough that the property is described as the property bought or inherited from AB and in that view even a description of the property "as my family property" would be sufficient. Where in a deed of conveyance, the properties dealt with were recited as "all the immovable and movable property which were in the possession and enjoyment of the deceased owner as belonging to him at the time of his death in a specific village" this Court held in *Subbalakshmiammal* v. *Narasimhaiah*[1], that the description was sufficient and satisfied the requirement of section 21 (1) of the Registration Act.

21. Thus, it is seen that every one of the grounds urged in the second appeal to assail the judgments of the Courts below is not a tenable one. Both on fact and in law, the family arrangement is, undoubtedly, a valid and sustainable one, and the appellants, who had fully participated in the family arrangement and had also manifested, by their conduct, till disputes arose between the parties that they abided by the terms of the arrangement must even be held estopped from disputing the family arrangement. In support of this view I need only refer to *Krishna Beharilal* v. *Gulabchand*[2], where it was held that when parties have derived advantages under a family arrangement, they would be estopped from repudiating the arrangement at a later stage. Having derived advantage under the family arrangement by escaping from the liability to repay the debts of Srinivasa Iyengar and also getting a share in the first defendant's properties even during her lifetime, there is scant grace and less justice in the appellants trying to put the clock back and raising the bogey of a contention that there was no family arrangement at all, and if there was one, it was not a legally recognisable one.

22. In the result the second appeal fails and is dismissed with costs to the first respondent-plaintiff.

23. The memorandum of cross-objections relates to item No. 24 and a scrutiny of the records shows that the learned District Judge had allowed the appeal in respect of this item due to a misconception. Admittedly this item was not included in Schedule A or in any other Schedule to Exhibit B-2 and therefore this item must also be held to be one of the items given to the plaintiff. The memorandum of cross-objections has therefore to be allowed and it is accordingly allowed, but there will be no order as to costs.

24. No leave in the second appeal.

R.S. *Appeal allowed.*

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1. (1927) 52 M.L.J. 482 : 25 L.W. 563 : A.I.R. 1927 Mad. 586.
2. (1971) 1 S.C.J. 30 : (1973) M.P.L.J. 991 : A.I.R. 1971 S.C. 1041.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, CJ.,* and *S. Natarajan, J.*

N. Karuppannan, General Secretary, The Madras C.S.I.R. Employees and Workers Union, Madras-20 .. *Petitioner.**

v.

The Additional Registrar of Trade Unions, Madras-4 and another .. *Respondents.*

The Administrative Officer, C.S.I.R. Madras Complex, Madras-20 .. *Petitioner*

v

M. Karuppannan and another .. *Respondents.*

The Secretary, The Council of Scientific and Industrial Research Employees and Workers Union, Madras-20 .. *Petitioner*

v.

The Co-ordinating Director, C.S.I.R. Madras Complex, Madras-20 and another .. *Respondents.*

and

The Workmen of Pasteur Institute of Southern India, Coonoor, by the Secretary, Pasteur Institute Staff Union .. *Appellant.*

v.

The Management of the Pasteur Institute of Southern India, Coonoor, The Nilgiris and another .. *Respondents.*

(A) *Industrial Disputes Act (XIV of 1947), section 2 (j)—Trade Unions Act (XVI of 1926)—"Industry"—Meaning of.*

(B) *Pasteur Institute of Southern India, Coonoor and Council of Scientific and Industrial Research, Madras—Whether industries.*

Section 2 (*j*) of the Industrial Disputes Act defines "industry" as meaning "any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen". Simple as the definition may at the first sight appear, its scope has proved to be one of complexity in judicial thinking as is evident from the decided cases. Divergence of opinion on that matter is more in the application of the definition rather than in the conception of industry as defined by the statute. [*Para.* 2.]

In the abstract, the word "industry" is capable of a much wider significance or import than when it is related and confined to any business, trade, undertaking, manufacture or calling of employers as is done by the first part of the definition in section 2 (*j*). The dominant element in the first part of the definition, is the commercial character of productive activity resulting in goods or service, distinct from one of a professional nature. When the first part of the definition is so understood, the inclusive part having regard to its intimate relation with the first part, is also highlighted by the commercial character, of the activity involved in any calling, service, employment, handicraft or industrial occupation or avocation of workmen. These different activities may have as their aim to produce goods or material service, which understood in the context of the first part, involved the commercial sense. For instance any calling for the inclusive part of section 2 (*j*) may exclude a teacher engaged in mere instruction of pupils in an educational institution as in a Law College or Engineering College or even an Industrial School. Service may not take within its scope under section 2 (*j*) the professional service of a lawyer or a doctor. But, when a teacher, or an engineer, or a lawyer or a doctor exerts by himself, or in working for an employer produces or helps to produce goods or service of a commercial character as the motive and end of the enterprise, then, of course, it will be different and may well fall inside the inclusive part of the definition. [*Para.* 3 *and* 4.]

Held, that the Madras Complex of the Council of Scientific and Industrial Research and the Pasteur Institute of

*O.P. No. 254 of 1974; A. No. 1121 of 1975. W.P. No. 4204 of 1974 and W.A. No. 193 of 1974. *5th February,* 1976.

Southern India, Coonoor, are not an industry either for purposes of the Industrial Disputes Act, or the Trade Unions Act.

Cases referred to :—

Safdar Jung Hospital, New Delhi v. *Kuldip Singh Sethi*, (1970) 2 S.C.J. 755: (1971) 1 S.C.R. 177 : A.I.R. 1970 S.C. 1407; *The Workmen of Indian Standards Institution* v. *The Management of Indian Standards Institution*, C.A. No. 1297 of 1970.; *State of Bombay* v. *The Hospital Mazdoor Sabha*, (1960) 2 S.C.R. 866 : 1960 S.C.J. 679 : A.I.R. 1960 S.C. 610.

O.P.No. 254 *of* 1974:—Petition to set aside the order dated 24th July, 1974 and made in B5/21602/73 on the file of the Additional Registrar of Trade Unions, Madras.

Application No. 1121 of 1975:—Application praying that for the reasons stated in the affidavit filed therewith the High Court will be pleased to issue directions to parties as to whether there should be any oral evidence and if there is to be such an oral evidence to permit the applicant to examine its own officers in chief instead of their attending as witness of the petitioner in the O.P. No. 254 of 1974.

*W.P.No.*4204 of 1974:—Petition under Article 226 of the Constitution of India praying that for the reasons stayed therein and in the affidavit filed in support thereof the High Court will be pleased to issue a writ of *mandamus* directing the second Respondent herein to reconsider the question of making a reference of the dispute pursuant to the order of the Secretary, Department of Labour, Employment and Housing, Government of Tamil Nadu, dated 23rd September, 1974 and made in G.O.(Ms.) No.883.

*W.A.No.*193 of 1974:—Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Palaniswamy, dated 20th January, 1973 and made in the exercise of the Special Original Jurisdiction of this Court in W.P.No. 864 of 1971 presented under Article 226 of the Constitution of India to issue a writ of *mandamus* directing the second Respondent herein to reconsider the question of making a reference of the dispute regarding non-employment of A. Jesudoss and the charter of demands made by the petitioner union and which was the subject-matter of the order of the Secretary, Department of Labour, Government of Tamil Nadu, Madras, dated 22nd May, 1970 and 8th July, 1970 in G.O. T. No. 1101.

R. Krishnamurthy for *S Senthilnathan* and *A. L. Somayaji* for *M/s. Aiyar & Delia*, for Petitioner.

R Krishnamurthy for *S. Senthilnathan, Rajan Ramani* for Government Pleader, *V.K. Tiruvenkatachari* for *M/s. King and Patridge, V. Suresham* and *K. Ramaswami*, for Respondents.

The Order of the Court was made by

Veeraswami, CJ. :—Whether the Pasteur Institute of Southern India, Coonoor, and the Council of Scientific and Industrial Research, Madras, are industries within the meaning of the Industrial Disputes Act, 1947, is the common question for decision in these otherwise unrelated matters. By an order dated 22nd May, 1970, the State Government declined to refer for adjudication the non-employment of one A. Jesudoss in the Institute, and certain demands raised by its workmen through the Institute Staff Union. The Government did so on the view that the Institute could not be considered as an industry for the purposes of section 2 (j) of the Industrial Disputes Act. The Staff Union unsuccessfully moved under Article 226 of the Constitution for a direction to the State Government to re-consider the question of making a reference. That is the subject-matter of the writ appeal. The Additional Registrar of Trade Unions, Madras by an order dated 24th July, 1974 cancelled the registration dated 27th August, 1973 as trade union of the Madras Council of Scientific and Industrial Research Employees and Workers Union. He was of the opinion that the Council of Scientific and Industrial Research Madras Complex, a branch of the Council of Scientific and Industrial Research was not engaged in any trade or industry, but the Complex was established for the purpose of assisting the

Scientific and Industrial Research, and that, therefore, the employees of the Complex were not workmen within the meaning of section 2 (g) of the Trade Unions Act, 1926. The Union had appealed under section 11 of the Trade Unions Act from that order. This appeal was directed to be treated as a petition to be dealt with in the Original Side of this Court, but later withdrawn and posted along with the connected writ petition which is also by that Union to direct the State Government to re-consider the question of making a reference of certain items of disputes for adjudication. Since the Government had earlier declined to make a reference on the view that the Complex was not an industry, but a department of Scientific Research and Service, the question we are called upon to resolve is eventually tied up with the facts relating to the character of each of these institutions. But in considering the problem, a basic and general understanding of what is an industry for the purpose of the Industrial Disputes Act and the Trade Unions Act, is necessary for its appropriate application to the facts. It may be taken that if the institutions we are concerned with are not industries for the purposes of the Industrial Disputes Act, it will be so also for the purposes of the Trade Unions Act.

Section 2 (j) defines "industry" as meaning "any business, trade, undertaking, manufacture, or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen". Simple as the definition may at first sight appear, its scope has proved to be one of complexity in judicial thinking as is evident from the decided cases. Divergence of opinion on that matter is more in the application of the definition rather than in the conception of industry as defined by the statute.

3. In the abstract, the word "industry" is capable of a much wider significance or import than when it is related and confined to any business, trade, undertaking, manufacture or calling of employers as is done by the first part of the definition in section 2 (j). The dominant element in the first part of the definition, as it appears to us, is the commercial character of productive activity resulting in goods or service, distinct from one of a professional nature. When the first part of the definition is so understood, the inclusive part, having regard to its intimate relation with the first part, is also highlighted by the commercial character of the activity involved in any calling, service, employment, handicraft or industrial occupation or avocation of workmen.

4. These different activities may have as their aim to produce goods or material service which, understood in the context on the first part, involved the commercial sense. For instance, any calling for the inclusive part of section 2 (j) may exclude a teacher engaged in mere instruction of pupils in an educational institution as in a Law College or Engineering College or even an Industrial School. Service may not take within its scope under section 2 (j) the professional service of a lawyer or a doctor. But, when a teacher, or an engineer, or a lawyer or a doctor exerts by himself, or in working for an employer, produces or helps to produce goods or service of a commercial character as the motive and end of the enterprise, then, of course, it will be different and may well fall inside the inclusive part of the definition.

5. E. I. Sykes and H. J. Glasbeek, in "Labour Law in Australia" after examining certain Australian decided cases, sum up that:

(i) If the dispute has reference to employment of a manual character, then regardless of whether a private or State enterprise, or any other potentially determining feature is involed, the dispute will be an "industrial" one.

(ii) An enterprise which is directly concerned with the production, maintenance, repair, distribution or tranport of tangible things or with the provisions of intangible things, such as gas and electricity, and with the services of banking and insurance, is an industrial one.

(iii) Certain occupations are never "industrial". They include the work done by medical practitioners, lawyers,

the police force, people in the armed services, apparently school teachers and scientists working as university employees."

They point out that the nature of the employees' work or the nature of the enterprise, among others, may be the deciding criterion to identify an activity as "industry" or "industrial". In our country there are numerous decisions on the scope of section 2 (*j*), including those of the Supreme Court, all of which may not be reconcilable.

6. *Safdar Jung Hospital, New Delhi* v. *Kuldip Singh Sethi*[1], reviewed almost all the earlier decisions which we need not, therefore, notice. The Supreme Court held that the hospital was not an industry. It said:

> "Before the work engaged in can be described as an industry, it must bear the definite character of 'trade' or 'business' or 'manufacture' or 'calling' or must be capable of being described as an undertaking resulting in material goods or material services.
>
> * * * * *
>
> If a hospital, nursing home or dispensary is run as a business in a commercial way there may be found elements of an industry there. Then the hospital is more than a place where persons can get treated for their ailment. It becomes a business.
>
> * * * * *
>
> Hospitals run by Government and even by private associations, not on commercial lines but on charitable lines or as part of the functions of Government Department of Health cannot be included in the definition of industry. The first and the second parts of the definition are not to be read in isolation as if they were different industries but only as aspects of the occupation of employers and employees in an industry. They are two counter parts in one industry."

It is noteworthy that the emphasis is on industry being an activity run or done as a business in a commercial way. In a recent judgment of the Supreme Court in *The Workmen of Indian Standards Institution* v. *The Management of Indian Standards Institution*[1], Bhagwati, J., with whom Goswami, J., agreed, but from both of whom Alagiriswami, J., dissented, it was held that the Indian Standards Institution was an industry. *State of Bombay* v. *The Hospital Mazdoor Sabha*[2], at one end, and the *Safdar Jung Hospital case*[3] at the other were referred to extensively. The majority judgment was devoted practically in its entirety is ascertaining the meaning and scope of the term as used in section 2 (*j*) of the Industrial Disputes Act. On a careful reading of the majority judgment, we do not, with all respect, think that it departed from the ratio of *Safdar Jung Hospital, New Delhi* v. *Kuldip Singh Sethi*[3]. In fact, the majority judgment has made extensive reference to extracts from the *Safdar Jung Hospital case*[3]. In this background, let us see the facts relating to the character of each of the two institutions in these cases.

7. By a Resolution of the Department of Commerce, dated 27th April, 1940 and 1st February, 1941 the Constitution of the Board of Scientific and Industrial Research and the Industrial Research Utilisation Committee were made. Since then, the need was felt for a body which could co-ordinate and generally exercise administrative control over the work of the two organisations. The Department of Commerce in the Government of India by a Resolution, dated 26th September, 1942 with a view to fulfil that need constituted a Council of Scientific and Industrial Research on a permanent footing. The main object of the organisation was not only the purposes just mentioned, but also to see how best the results achieved by the two bodies could be utilised in practice. The Council has been registered as a Society under the Registration of Societies Act, 1860, and the actual administration of its affairs as well as its funds have been entrusted to a Governing Body of the Council cons-

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1. (1970) 2 S.C.J. 755 : (1971) 1 S.C.R. 177: A.I.R. 1970 S.C. 1407.

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1. C.A. No. 1297 of 1970.
2. 1960 S.C.J. 679 : (1960) 2 S.C.R. 866 : A.I.R. 1960 S.C. 60.
3. (1970) 2 S.C.J. 755 : (1971) 1 S.C.R. 177: A.I.R. 1970 S.C. 1407.

tituted according to the rules and regulations of the Council. The Council has set up its own Advisory Bodies to examine proposals of Scientific and Industrial Research and to report to the Governing Body on the feasibility of the proposals and to advise on any other question referred to them by the Governing Body. The Governing Body, as it was originally constituted, consisted of the Member of the Council of the Governor-General in charge of the portfolio of Commerce, a Representative of the Commerce Department of the Government of India, a Representative of the Finance Department of the Government of India, two members of the Board of Scientific and Industrial Research elected by the Board, two members of the Industrial Research Utilisation Committee elected by the said Committee; the Director of Scientific and Industrial Research, and one or more members to be nominated by the Government of India to represent interests not othewise represented. The functions of the Council, among other things, were to implement the resolution passed by the Legislative Assembly on 14th November, 1941 to wit:

> "This Assembly recommends to the Governor-General-in Council that a fund called the Industrial Research Fund be constituted, for the purpose of fostering industrial development in this country and that provision be made in the Budget for an annual grant of rupees ten lakhs to the fund for a period of five years."

The other objects of the Council were—

> "the promotion, guidance and co-ordination of scientific and industrial research including the institution and the financing of specific researches; the estalishment or development and assistance to special institutions or departments of existing institutions for specific study of problems affecting particular industries and trade; the establishment and award of research studentships and fellowships the utilisation of the results of the researches conducted under the auspices of the Council towards the development of industries in the country and the payment of a share of royalties arising out of the development of the results of researches to those who are considered as having contributed towards the pursuit of such researches; the establishment, maintenance and management of laboratories, workshops, institutes and organisations to further scientific and industrial research and to utilise and exploit for purposes of experiment or otherwise any discovery or invention likely to be of use to Indian industries; the collection and dissemination of information in regard not only to research but to industrial matters generally; publication of scientific papers and a journal of industrial research and development; and any other activities to promote generally the objects of the resolution."

The Board of Scientific and Industrial Research has on its membership, mostly distinguished men of science and various disciplines, and so too the Industrial Research Utilisation Committee. The Industrial Research Fund at the disposal of the Council would consist of grants from the Central Revenues from time to time, other sources by grants from State Governments, by Industrialists for special or general purposes, contributions from Universities or local bodies, donations or benefactions, royalties, etc., received from the development of the results of industrial research, and miscellaneous receipts. The Council of Scientific and Industrial Research will exercise full powers with regard to the expenditure to be met out of the Industrial Research Fund, subject to its Bye-laws. While forming the Council, the Government of India expressed the hope that the facilities afforded by the Council of Scientific and Industrial Research will be availed by all interested in Indian Industrial Development and that the State Governments would assist the Council in its work by establishing Provincial Advisory Boards of Scientific and Industrial Research to form liaison with the Board of Scientific and Industrial Research. The Memorandum of Association of the Council of Scientific and Industrial Research mentions its objects which include —

(a) implementation and giving effect to the resolution of the Assembly we have already referred to;

(b) the promotion, guidance and co-ordination of scientific and industrial research including the institution and the financing of specific researches;

(c) the establishment or development and assistance to special institutions or departments of existing institutions for scientific study of problems affecting particular industries and trade;

(d) the establishment and award of research studentships and fellowships;

(e) the utilisation of the results of the researches conducted under the auspices of the Council towards the development of industries in the country and the payment of a share of royalties arising out of the development of the results of researches to those who are considered as having contributed towards the pursuit of such researches;

(f) the establishment, maintenance and management of laboratories, workshops, institutes and organisations to further scientific and industrial research and to utilise and exploit for purposes of experiment or otherwise any discovery or invention likely to be of use to Indian industries;

(g) the collection and dissemination of information in regard not only to research but to industrial matters generally;

(h) publication of scientific papers and a journal of industrial research and development;

(i) for the purpose of the Society to draw and accept and make and endorse, discount and negotiate Government of India and other promissory notes, bills of exchange, cheques or other negotiable instruments;

(j) to invest the funds of, or money entrusted to, the Society upon such securities or in such manner as may from time to time be determined by the Governing Body and from time to time sell or transpose such investment;

(k) to purchase, take on lease, accept as a gift or otherwise acquire, any land or building wherever situated in India which may be necessary or convenient for the society;

(l) to construct or alter any building which may be necessary for the Society;

(m) to sell, lease, exchange and otherwise transfer all or any portion of the properties of the society;

(n) to establish and maintain a research and reference library in pursuance of the objects of the Society with reading and writing rooms and to furnish the same with books, reviews, magazines, newspapers and other publications;

(o) to employ and pay the necessary staff for the purposes of the Society and maintain a provident fund for the benefit of such staff or any portion thereof; and

(p) to do all other such things as the Society may consider necessary, incidental or conducive to the attainment of the above objects.

Since 1942 the CSIR has gathered momentum. It has set up a chain of national laboratories and research institutes in various parts of the country especially after 1950. We find from the introduction to "Our Research Institutions", the CSIR, along with other major scientific organisations, like the Indian Council of Agricultural Research set up in 1929, the Department of Atomic Energy, set up in 1954, and the Defence Research and Development Organisation set up in 1958, accounts for over 68 per cent of the total expenditure on scientific research and development in this country, and the CSIR is the largest among them all. Under the CSIR, there are about 30 national laboratories and other research institutions, four of which are regional laboratories. Two other organisations are devoted to dissemination of scientific information, and there are two industrial and technological museums, besides, ten industrial co-operative research associations functioning under the auspices of the CSIR. Six of them are said to be concerned with the textile industry, and the other four with cement, plywood, automotive research and tea. Financial assistance to the extent of 50 per cent of their capital and recurring

expenditure is provided by the Council to each of these research associations. It is also useful to note the following from the Introduction to "Our Research Institutions".

"As can be seen from a quick survey of their work, all these research institutions, except for a very few, like the National Chemical Laboratory and the National Physical Laboratory, deal with specific areas, such as food, fuel, buildings, and roads or with problems of interest to specific industries, like electronics, glass and ceramics, leather, minerals and metals, marine chemicals, drugs and scientific instruments, or with applied science and technology, like mechanical engineering, electro-chemistry, geophysics, oceanography, experimental medicine and toxicology. The functions of the four regional laboratories are primarily related to industrial development in their respective geographic areas. Each research institution is headed by a Director and is guided by an executive council. The CSIR, which controls all these institutions, is headed by a Director-General. The Council has a Board of Scientific and Industrial Research, which is the Chief Advisory Body in all scientific matters, and a Governing Body, with the Prime Minister, as its President. With the establishment of the chain of laboratories and other research institutions, India has laid the framework for sustained scientific pursuit and endeavour. Along with other research agencies, these institutions provide "the flesh, muscle and sinews through which policy decisions at the national level can be translated into practical results." These, firmly supported by pilot plants, workshops, libraries and documentations and extension services, provide a strong infrastructure for a corps of over 9,500 highly qualified scientists and technologists. This sizeable scientific potential, apart from undertaking prolonged investigations on basic and fundamental problems, also tackles "specific time-targeted projects lying in more than one discipline." The CSIR laboratories, along with other scientific and technological institutions in this country, try "to provide technological and engineering inputs and indicate the pathways into which the industry and economy must move to harmonise with the national consent of self-reliance" as Dr. T. Nayudamma Director-General of the CSIR, put it.'

8. The Madras Complex, with which we are concerned of the CSIR is thus a Union Agency set up for promotion of special Studies and Research and for co-ordination in Institutions for higher research and Scientific and Technical Institutions. The Complex gets its funds for expenditure from the Fund of the CSIR. The Appropriation Acts of 1971 to 1974 of the Union of India show that for the three years, 1971 to 1973 sums of Rs. 23,21,21,000, Rs. 4,12,22,000 and Rs. 4,03,91,000 were made over to the CSIR as grants from the Union of India.

9. The CSIR is thus financed by the Government of India. The receipts and expenditure of the CSIR for the years 1971 to 1973 under broad and major heads throw light to a certain extent on the character of the CSIR.

Receipts	1970—71	1971—72	1972—73
	Rs.	Rs.	Rs.
1. Grants from Government of India	19,67,30,507.73	21,43,37,146.88	24,56,30,000.00
2. Miscellaneous (Laboratories and Institutes)	1,30,85,702.73	1,42,68,120.77	1,69,46,375.2
Expenditure :			
1. Pay and Allowance	8,29,00,504.76	8,90,11,133.32	9,71,96,487.36
2. Contingencies (Laboratories, Store. Institutes etc)	1,64,69,105.85	1,85,39,581.66	2,07,43,803.37
3. Scientists Pool	26,41,334.48	28,50,641.52	31,18,467.40
4. Fellowships and Scholarships	13,38,126.42	13,40,919.75	13,61,404.85
5. Special Research Programmes (Grant-in-aid retired emeritus Scientists)	1,00,00,000.00	1,00,00,000.00	1,00,00,000.00
6. Pilot Plants Staff P/L Allowances etc.	1,46,52,045.41	1,31,65,526.56	1,19,57,940.00

It may be seen from the table above that the bulk of the funds for the expenditure comes from the Government of India, and miscellaneous receipts from Laboratories and Institutes,and the expenditure is mostly on pay and allowances, contingencies, Scientists Pool, Fellowships and Scholarships, Special Research Programmes as Grant-in-aid and Pilot Plants Staff Allowances. The receipts from Laboratories and Institutes are through what is called job work and consultancy service. The Laboratories and Institutions of the CSIR carry out research programmes under the plans of Scientific and Industries Research approved by the National Council for Science and Technology. In the Research Institutions, Scientists undertake various Research Projects. They develop processes and inventions, and some of the processes are also patented. Under an agreement entered into between the National Research Development Corporation of India, a Company registered under the Indian Companies Act, 1913, and the CSIR, the Corporation pays the CSIR a share of the royalties arising from the exploitation of inventions, patents and technical and engineering know-how of processes, in consideration of the CSIR assigning and transferring to the Corporation all its rights in such inventions and patents and engineering know-how and processes. The Corporation exploits the patents and inventions by granting licences to parties who use them for industrial purposes. Development of such inventions and processes and supply of know-how and their exploitations as just mentioned, do not, in our opinion, amount to rendering material service of an industrial character in a commercial sense. As a matter of fact, it appears that the royalties received by the CSIR are small in comparison with the total income and expenditure of the CSIR. The Laboratories and Institutions, as we find, also do consultancy service in the rendering of which they undertake job work as part of such service. If any industry encounters a difficult problem,the Council provides expert service to solve it. The Council investigates the problem with its expert knowledge and the solution found is extended to the industry. A nominal charge is collected by the Council for the service, which is also very little when compared to the total receipts and expenditure of the CSIR. It is explained that when the work is done inside the Institution, it is treated as job

work, and when the experts are called upon to proceed outside and carry out the investigation, it is called "Consultancy Service". Guidelines are given by the Council regarding rendering of consultancy services. A perusal of the descriptions of some of the job work or consultancy service so undertaken and fees received, convinces us that the object and nature of the job work and consultancy service are not business carried on in a commercial sense.

10. The Madras Complex are said to consist of the units :

(1) Central Mechanical Engineering Research Institutes, Durgapur ;

(2) Structural Engineering Research Centre, Rourkela ;

(3) Central Scientific Instruments Organisation, Chandigarh ;

(4) Central Electrochemical Research Institute, Karakudi ;

(5) Central Public Health Engineering Research Institute, Nagpur ;

(6) National Metalurgical Laboratory, Jamshedpur ; and

(7) C.E.E.R.I.

The nature of the work and the financing, almost wholly by Government, show that these institutions are Research Institutions in the course of working of which, as detailed earlier, they can hardly be said to be engaged in any commercial enterprise in the sense of rendering material service, supplying goods and others as a business or trade. The Council produces, as has been stated in the counter statement of the CSIR, certain number of items more to serve as prototypes of goods which can be produced by others utilising the processes developed by the Institution. Sometimes Pilot Plants are set up with the object of demonstrating that the processes developed by the Institutions are commercially and technically viable. When the demonstration is over, the Pilot Plants appear to be dismantled. Seldom such Pilot Plants are sold to serve as a prototype, and even when there is a sale, it is only for a very nominal amount.

11. No doubt, factory licence has been taken by the CSIR Madras Complex. But, it has to be noted that the Institute consists of various sections and departments and factory licence seems to have been obtained only with reference to one of those sections. Though such a factory licence is taken for a section, the Government of Tamil Nadu, having regard to the character of the CSIR, have exempted it from certain provisions of the Factories Act.

12. On behalf of the employees and workers union it is stated that the CSIR Research Laboratories advertise in open market for selling industrial know-how and processes, the CSIR has arrangement with all industries in India to help the Industrial Community at large, does workshop activities collecting service charges, shares the profits of the Indian Industries by collecting royalties, distributes the profits to the participating scientists of the concerned projects, manufactures and sells products in the name of Pilot Plants. It is also stated that Central Leather Research Institute, one of the CSIR Laboratories, has taken out a factory licence, and as factory it cannot be regarded as an Educational Institution.

13. We have given our careful consideration to the character of the Madras Complex of the CSIR and are of opinion that they are merely Research institutions engaged in Research work in order to help industries, and develop industries with their scientific and technological experience and know-how. The entire activity of the complex, as it appears to us, is, therefore, educational, and is not industry in a commercial sense. There is no trade or business involved in a commercial sense. The mere fact that royalties are collected or Pilot Plants are sold and a small nominal amount is realised, or job work is done for a consideration, will not on a proper perspective of the character of the entire activity of the CSIR Complex, make any difference to the real nature of the Complex as consisting of Educational Institutions.

14. The CSIR Complex is one of those Agencies and Institutions contemplated by Entry 65 of the Union List in the Seventh Schedule to the Constitution. That Entry relates to Union Agencies and

Institutions for professional, vocational or technical training, including the training of police officers; or the promotion of special studies or research; or scientific or technical assistance in the investigation or detection of crime. Entries 63 to 66 are carved out and put down separately in the Union List from Entry 11 of the State List which is 'Education including Universities', subject to the provisions of Entries 63 to 66 of List I and Entry 25 of List III. Entry 63 in the Union List relates to the Benares Hindu University, the Aligarh Muslim University as they were known at the commencement of the Constitution, and other institutions to be declared by Parliament to be institutions of national importance. Entry 65 comprises of institutions financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance. The CSIR is one of those institutions for scientific and technical education. The CSIR is a professional, vocational and technical training institution. It is also engaged in promotion of special studies and Research. As we have already noticed, one of the objects of the CSIR is co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions which is comprehended by Entry 66 of the Union List.

15. We are not, therefore, persuaded that merely on account of the receipt of royalties or nominal price for some job work done, sale of some goods in the course of Industrial Research and Development of Industries, what is really an institution essentially educational in character, should be stamped as an industry in a commercial sense. We hold that the Madras Complex is not an industry either for the purpose of the Industrial Disputes Act, or the Trade Unions Act.

16. We have next to determine the character of the Pasteur Institute of Southern India, Coonoor, in The Nilgiris. The object and main work of the Pasteur Institute, as the record shows, is to carry on research on communicable diseases of national importance. It has done research on rabies and laboratory work in influenza. In fact, the Institute appears to be the Influenza Centre of the Government of India. Research on intestinal virus and other respiratory viruses, vaccine, small pox and trachamos is made in the Institute. Other studies on tissue culture and bacterial diseases like cholera, syphillis are also made in this Institute. The Institute runs a clinical laboratory and its purpose is stated to be to keep in touch with the medical profession in connection with its research programmes. It may thus be seen that the Institute is basically a Research Centre. It seems to be a training centre as well, because training is given in the Institute in rabies, other virus diseases and general bacteriology for workers sponsored by the World Health Organisation Central and State Governments and other institutions in the country. The Institute has been recognised by Universities for training candidates for the post-graduate Degrees in Bacteriology and Virology. The members of the Central Committee of the Pasteur Institute consist of Heads of Medical, Public Health, Veterinary, Public Works Department, Senior Administrative Officers of the Government of Tamil Nadu and others like Lawyers, Chartered Accountants and Engineers. By a notification of the Government of India, the Institute has been recognised as a charitable organisation as well. In our opinion, the Institute is not, therefore, an industry, but a Research Institute and a Training Centre. No doubt, anti-rabies vaccine is prepared in the Institute and it is supplied to State Governments, the Army and the Railways; but, it is not, as we understand, sold in open market. This feature by itself does not enable us to hold the institution to be commercial. The sale of anti-rabies vaccine by the Institute does not convert it into a trading or commercial or industrial concern. We note that the Institute does not distribute any profits, though of course, this is not determinative in itself of the character of the Institute. But the fact is note-worthy, and is not irrelevant to the issue of character of the Institute. It was said that medical services were rendered in the Institute on payment of fees; but what is pointed out to us by the Institute is that indigent patients are treated free of charges in the Anti-rabies Treatment Centre run by the

Institute, and that in the case of paying patients, the cost of vaccine alone is recovered without charging any fees for the services rendered. On this background of facts, the claim of the Institute that it is essentially a Research-*cum*-Charitable Organisation working for the benefit of humanity without any profit motive, is well-founded. Too much importance cannot be attached to the fact that the Institute is making an income of Rs. 20,000 per annum from the Clinical Laboratory, for, the Institute asserts that it is not even sufficient to meet the cost of the materials used and also the pay and allowances of the staff employed in the Laboratory. Nor are we satisfied with the fact that the Institute has undertaken preparation of polio-vaccine for the protection of 50 millions of susceptible children in the country, on behalf of the Government of India, as a national service on 'no profit no loss' basis, makes the Institute's activity a trading activity. Until April 1969 the Ministry of Health, Government of India, was making grants to the Institute to carry out research on communicable diseases of national importance, and thereafter, the grant is routed through the Indian Council of Medical Research which is concerned with the medical research in the country under the auspices of the Government of India. We hold that the Pasteur Institute of Southern India, Coonoor, is not an industry either for purposes of the Industrial Disputes Act, or the Trade Unions Act.

17. The Original Petition, the application, the Writ Petition and the Writ Appeal are dismissed. No costs.

R.S. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*N.S. Ramaswami, J.*

Saranga Padayachi .. *Appellant**

v.

Vairakannu Chettiar .. *Respondent**

Tamil Nadu Agriculturists Relief Act (IV of 1938), section 20—Execution of decree—Application under section 20—Filed beyond 60 days of the order—Barred by limitation.

If the judgment-debtor had not invoked section 20 (of Act IV of 1938) and obtained stay of execution, he can always approach the Court which passed the decree (as long as the decree had not been satisfied) for scaling down the debt, if he is entitled to such scaling down on merits. But once he invokes the jurisdiction of the Court under section 20 and obtains stay of execution, then, undoubtedly, a period of limitation is prescribed by the proviso to that section which specifically says that unless an application under section 19 (if it had not been already filed) is filed within sixty days of the order of stay, the decree shall be executed as it stands. [*Para.* 4.]

Cases referred to:—

Kumaraswami Pillai v. *Thiruvengadatha Aiyangar*, (1939) 2 M.L.J. 308 : 49 L.W. 762: I.L.R. (1939) Mad. 886: A.I.R. 1939 Mad. 613; *Dharmarajan* v. *Nagalinga Kandiar*, (1975) 2 M.L.J. 34; *Krishnamurthi Iyer* v. *Sethurama Iyer*, (1976) 1 M.L.J. 10.

Appeal against the order of the Court of the Subordinate Judge of Cuddalore dated 25th April, 1974 and made in I.A. No. 887 of 1974 in O.S. No. 258 of 1965.

K. Sampath, for Appellant.

P.S. Ramachandran, for Respondent.

The Court made the following

ORDER.—The petitioner before me filed an application under section 20 of Act

* A.A.O. No. 396 of 1975. 26*th February*, 1976.

IV of 1938 as early as 1973 and obtained an order of stay of execution by the order dated 18th June, 1973. He did not care to file an application under section 19 within sixty days of the said order, as contemplated under the proviso to section 20. Later *i.e.*, on 11th April, 1974 the application out of which the present civil miscellaneous appeal arises came to be filed under section 19 for scaling down the debt. This is clearly barred by limitation.

2. It is contended on behalf of the appellant-judgment-debtor that section 19 itself does not provide for any period of limitation. that an application under that section can be filed at any time and that, therefore, the proviso to section 20 should not be invoked in support of the contention that the application under section 19 is barred by limitation. I am unable to agree with that contention.

3. The proviso to section 20 clearly says that if an application under section 19 had already not been filed and if such an application is not filed even within sixty days of the order of stay, then the decree shall be executed as it stands. (without being scaled down.) In *Kumaraswami Pillai* v. *Thiruvengadatha Aiyangar*[1], a Division Bench of this Court had to consider whether the said proviso to section 20 is a condition precedent which means that beyond the period of sixty days provided therein no application under section 19 can be entertained, any delay cannot be excused, or whether it prescribes only a period of limitation in which event section 5 of the Limitation Act can be invoked and the delay can be excused for proper and adequate reasons. The Division Bench held that the proviso prescribes only a period of limitation.

4. The contention on behalf of the judgment-debtor is that in spite of the above said proviso to section 20, there is no period of limitation at all in respect of an application under section 19. It is true that if the judgment-debtor has not invoked section 20 and obtained stay of execution, he can always approach the Court which passed the decree (as long as the decree has not been satisfied) for scaling down the debt, if he is entitled to such scaling down on merits. But once he invokes the jurisdiction of the Court under section 20 and obtains stay of execution, then undoubtedly a period of limitation is prescribed by the proviso to that section which specifically says that unless an application under section 19 (if it had not been already filed) is filed within sixty days of the order of stay the decree shall be executed as it stands.

5. The learned counsel for the judgment-debtor referred to my decision in *Dharmarajan* v. *Nagalinga Kandiar*[1], and that rendered by Justice Mohan, reported in *Krishnamurthi Iyer* v. *Sethurama Iyer*[2], in the course of his arguments. But those cases were concerned with the question whether if a Court-sale had taken place after the commencement of the amendment Act (VIII of 1973), the judgment-debtor can invoke section 23 (*c*) and pray for setting aside the same. It was held that the judgment-debtor having had enough opportunity to file an application under section 19 (before the Court-sale takes place) in respect of sales which take place after the publication of Act VIII of 1973, section 23 (*c*) cannot be invoked. Those decisions have nothing to do with the question of limitation that arises in the present case.

6. The conclusion of the Court below that the present application under section 19 is barred by limitation is correct. The appeal fails and the same is dismissed. However, there is no order as to costs.

S.J. ——— *Appeal dismissed.*

1. (1939) 2 M.L.J. 308 : 49 L.W. 762: I.L.R. (1939) Mad. 886 : A.I.R. 1939 Mad. 613.

1. (1975) 2 M.L.J. 34.
2. (1976) 1 M.L.J. 10.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

K. Thirumalai Nambi .. *Appellant**

v.

Maharaja Pillai .. *Respondent.*

Transfer of Property Act (IV of 1882)—Simple mortgage—Execution of document—Undertaking to pay principal and interest separately—Suit for arrears of interest alone—Subsequent suit for recovery of arrears of subsequent interest and principal whether barred.

Since upon the failure of the mortgagor to pay interest for three consecutive months, both the principal and interest became due under the terms of the mortgage, in such circumstances, if the mortgagee had sued for interest alone, a subsequent suit for recovery of principal would be barred in view of the provisions of Order 2, rule 2, Civil Procedure Code.

The object of Order 34, rule 14 is, to prevent the mortgagee from bringing to sale the bare equity of redemption in execution of a money decree, which he may have obtained in respect of a claim under the mortgage. Therefore the contention that Order 34, rule 14 is an exception to Order 2 is without any substance. [*Para.* 29.]

Cases referred to :—

Chunilal v. *Amir Ahmedi Bee*, (1958) 2 An.W.R. 286: (1958) An.L.T. 275: A.I.R. 1958 A.P. 608; *Yashvani* v. *Vithal*, I.L.R. (1897) 21 Bom. 267; *Mohammed Hafiz* v. *Mirza Muhammad Zakariya*, (1922) 42 M.L.J. 248: 49 I.A. 9: A.I.R. 1922 P.C. 23; *Kishan Narain* v. *Pala Mal*, (1923) 44 M.L.J. 123: 72 I.C. 187: 50 I.A. 115: A.I.R. 1922 P.C. 412; *B. R. Swamy Rao* v. *The Official Assignee of Madras*, (1925) 49 M.L.J. 474: 22 L.W. 17: I.L.R. 48 Mad. 703: A.I.R. 1925 Mad. 1120; *Sivasubramania Pillai* v. *Nagappa Pillai*, (1927) 52 M.L.J. 636: 102 I.C. 187: 25 L.W. 615: A.I.R. 1927 Mad. 580; *Rego* v. *Phillip Taure*, (1929) 56 M.L.J. 580: 120 I.C. 853: 29 L.W. 400: A.I.R. 1929 Mad. 371; *Lalta Prasad* v. *Puran Lal*, A.I.R. 1930 All. 286; *Ramnath* v. *Karnidan*, A.I.R. 1963 Raj. 160; *Puran Chand* v. *Har Parshad*, A.I.R. 1935 Lah. 672 (F.B.).

Appeal against the decree of the Court of the District Judge, Kanyakumari at Nagercoil in Appeal Suit No. 427 of 1970, preferred against the decree of the Court of the District Munsif of Nagercoil in Original Suit No. 343 of 1970.

K. Sarvabhauman and *T. R. Mani*, for Appellant.

The Court made the following

JUDGMENT:—The plaintiff is the appellant before me. The short facts in the second appeal are as follows:—

2. The plaintiff preferred O.S. No. 343 of 1970 on the file of the District Munsif's Court, Nagercoil, for recovering the mortgage amount under Exhibit A-1, dated 14th November, 1968, which was executed in his favour for a sum of Rs. 1,000. In and by the said document, the defendant undertook to pay interest and principal, separately and allow the plaintiff to sue for interest that has accrued for three consecutive months. Interest of Rs. 25 was paid only for one month, and thereafter, there was default to pay the same upto 14th October, 1969, which led to the filing of Small Causes Suit No. 384 of 1969, and obtaining of a decree for the interest alone. Hence, the present suit for the recovery of the subsequent interest and the entire principal outstanding.

3. The defendant admitted the execution of the hypothecation bond and also the Small Causes Suit and the decree thereon. But according to him, the present suit was barred by the provisions of Order 2, rule 2 of the Code of Civil Procedure.

4. The learned District Munsif upheld the plea of the defendant, and dismissed the suit. On appeal in A.S. No. 427 of 1971, the learned District Judge, Kanyakumari at Nagercoil, confirmed the findings of the trial Court. Hence, the present second appeal.

* S.A. No. 1044 of 1972. 3rd September, 1975.

5. The only question that arises for my determination is, whether the plaintiff could be non-suited by the application of Order 2, rule 2, Code of Civil Procedure.

6. Mr. T.R. Mani, learned counsel for the appellant contends that this is an extremely hard case and his client could succeed, if he is able to touch the sympathetic chord of the Court, and that could well be done only if a proper background of Order 2, rule 2, Code of Civil Procedure is provided. With this end in view, he cited many rulings.

7. Mr. S. Padmanabhan, learned counsel appearing as '*amicus curiae* in countering these arguments submits that, however sympathetically viewed, the appellant cannot succeed in view of the categoric provision of Order 2, rule 2, Code of Civil Procedure, since upon the failure of the mortgager to pay interest for three consecutive months, both the principal and the interest became due. Under such circumstances, the mortgagee had sued for interest alone. The latter suit for recovery of principal would be barred in view of the said provision. The cases cited are clearly distinguishable and the ruling which has a direct bearing on the issue involved in this case is *Chunilal* v. *Amir Ahmedi Bee*[1].

8. In the case on hand, Exhibit A-1 reads as follows:—

"எனது தாயார் உமயம்மை காலமான பிறகு தபசில் சொத்துக்கள் எனக்கு பூர்ண உரிமைப்பட்டு கைவசம் வைத்து அனுபவித்து வருவதும் இதில் 1-ம் நம்பர் சொத்தில் தோவாளையில் அவயார் அம்மாள் சொர்ணம் என்ற தானம்மாளுக்கு பூதப்பாண்டி சப் ரெஜிஸ்தரில் 1-225-97-1402/1968-ம் நம்பராக 1100ரூக்கு அடமானம் எழுதிக் கொடுத்திருக்கும் பாத்தியதையில் மட்டும் உள்பட்டதும் வேறு எவ்வித வில்லங்கத்திலும் உள்படாததுமாகும். இவ்விதமுள்ள தபசில் சொத்துக்களை தங்களுக்கு 1000 ரூபாய்க்கு அடமானமாக எழுதி தந்து பணப்பற்று விபரப்படி ரூபாய் பற்றியிருப்பதால் ஷெ ரூபாய்க்கு இன்று முதல், மாதம் ஒன்றுக்கு பலிசை தர சம்மதித்த ரூ. 25. இந்த ரூ. 25 வீதம் வருகிற அதாவது மாதத்து பலிசை மறுமாதம் ஐந்தாம் தேதிக்காலம் தங்களிடம் தந்து ரெசிதுவாங்கியும் முதல் தாங்கள் தேவைப்படும் போது தந்து என் சிலவில் பற்று காட்டி வாங்கியும் கொள்வேன். மூன்று மாதத்து பலிசை ஒன்ருக முடக்குவதானல் முடக்கலின் பலிசைக்கு தனியாகவோ, பலிசையும் முதலும் சேர்த்தோ தங்கள் இஷ்டம்போல் வசூல் செய்து கொள்ளவும். அதில் வைத்து தங்களுக்கு நேரிடும் சகல சிலவு நஷ்டங்களுக்கும் தபசில் சொத்துக்களும் நானும் என் வேறு சொத்துக்களுக்கும் பொறுப்புத்தாரியுமாகும். அசல்தொகை தங்களுக்கு தந்து தீருவது பரியந்தயம் மேல் சொன்னமாதம் ஒன்றுக்கு ரூ. 25 வீதமுள்ள பலிசை தந்து கொள்வேன். முன் பத்திரம் தந்திருக்கிறேன்."

According to the learned counsel for the appellant, by a reading of this document it could easily be seen that (*i*) option has been given to the mortgagee to recover either the interest or the principal according to his convenience, and (*ii*) there is a personal covenant by the mortgagor for the payment of interest alone. Thus, according to him, in so far as the previous S.C.S. No. 384 of 1969 was not for the enforcement of the hypothecation bond, and was only on the personal covenant, the present suit for the enforcement of the mortgage cannot be said to be barred by Order 2, rule 2, Code of Civil Procedure. Moreover, where the mortgagee sues for the recovery of the mortgage amount and for interest, there being two different causes of action, there is no bar under Order 2, rule 2, Code of Civil Procedure.

9. The fallacy in the argument of Mr. T.R. Mani lies in this: there is no personal covenant for the payment of interest alone, because, all that Exhibit A-1 says is:

"அதில் வைத்துத் தங்களுக்கு நேரிடும் சகல செலவு நஷ்டங்களுக்கும் தபசில் சொத்துக்களும் நானும், என் வேறு சொத்துக்களும் பொறுப்புத்தாரியுமாகும்."

By this, it is meant that in the process of recovery of the mortgage amount, or the

1. (1958) 2 An.W.R. 286 : (1958) An.L.T 275 : A.I.R. 1958 Andh. Pra. 608.

interest, if the mortgagee sustains any loss, that will be compensated personally or from the other properties of the mortgagor.

(2) The vital clause in the document is that if interest is not paid consecutively for a period of three months, the mortgagee has option to sue either for the principal or for interest, at his choice, since the wording is: * * *

10. From this it is clear, that by the non-payment of the interest for a period of three months, the entire mortgage amount becomes due. Thus, the construction sought to be placed by Mr. T.R. Mani on the wording of Exhibit A-1 is incorrect.

11. I will now proceed to consider the case-law.

12. In *Yashvani* v. *Vithal*[1], it was held:

> "The breach of covenant in a mortgage bond to pay interest each year which covenant is not confined to the fixed period of the mortgage and is distinct from and independent of the claim of the mortgagee to recover the principal sum, and the performance of which is secured in a different manner, gives rise to a distinct cause of action which can be sued upon without suing for the principal, and a decree obtained on such bond for overdue interest does not, under section 43 of the Civil Procedure Code (XIV of 1882), bar a subsequent suit to recover the principal and interest by sale of the mortgaged property."

This case is clearly distinguishable, because there is no distinct and independent claim of the mortgagee to recover the principal sum.

13. In *Muhammad Hafiz* v. *Mirza Muhammad Zakariya*[2], it was held thus:

14. Now the whole question depends upon considering whether the terms of rule 2, Order 2 do really bar the plaintiffs from the relief that they seek, and no one would be anxious to stretch or strain the language of that rule in order to cover a case where, if it be made applicable, it is obvious that the plaintiffs may suffer a substantial wrong. The rule runs in these terms:—

> "(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court."

15. There are other provisions of the Order to which reference need not be, made, because, in their Lordships' opinion, the exact provision of rule 2, sub-section (1), which has been read, covers and fits the present dispute. What was the cause of action that the plaintiffs possessed when the proceedings were first instituted? It was the cause of action due either to the fact that the interest had been unpaid for more than six months, or that the three years had elapsed, and the principal was also unpaid, and in either case they could have sued for realisation to provide for the whole amount secured by the deed.

16. The plaintiffs now purported to proceed under clause 2 of the deed, but even in that case the non-payment of the interest was the sole cause upon which they were entitled to ask either for the limited relief that was sought or the larger relief which they abstained from seeking. It is also important to point out that the only relief that could be sought in both cases was realisation of the mortgage security, for the mortgage was a simple mortgage containing no express covenant for the payment of the principal and the interest".

17. The decision of the Privy Council concludes the case against the appellant.

18. Again in *Kishan Narain* v. *Pala Mal*[1] the Judicial Committee observed thus:

> "That rule 2 of Order 2 of the Code of Civil Procedure is the relevant section of the Code applicable to the dispute is not

1. (1897) I.L.R. 21 Bom. 267.
2. (1922) 42 M.L.J. 248: 49 I.A. 9 : A.I.R. 1922 P.C. 23.

1. (1923) 44 M.L.J. 123 at 126: 72 I.C. 187 : 50 I.A. 115 : A.I.R. 1922 P.C. 412.

in contest. The whole question is what does it mean? It does not appear to their Lordships that if the mortgage had provided, as mortgages always do in this country, for an independent obligation to pay the principal and the interest, then in a suit brought to obtain a personal judgment in respect of the interest alone the rule would have prevented a subsequent claim for payment of the principal. In such a case the cause of action would have been distinct. The matter is, however different if the non-payment of the interest causes the principal money to become due, as in that case the cause of action, the non-payment of the interest, gives rise to two forms of relief which the Code provides shall not be split. This is illustrated by the present suit".

In my view, the position is exactly the same.

19. *B.R. Swamy Rao* v. *The Official Assignee of Madras*[1] contained an independent covenant for payment of interest. On the construction of that instrument, following the ruling of the Privy Council, it was held at page 476:

> "Now, what of this instrument? It seems to me perfectly clear that there is an independent covenant for the payment of interest and that the principal actually becomes payable not on failure to pay a current instalment of interest but on failure to comply with the demand to pay the interest and interest and principal due together. There is no proviso here, which I quite agree might make all the difference, that the failure to pay instalment of interest shall make the whole principal amount due."

This decision, therefore, does not help the appellant.

20. In *Sivasubramania Pillai* v. *Nagappa Pillai*[2], the mortgage deed contained a provision to pay interest at the end of each year and the principal at the end of two years. The stipulation was, on default of payment of interest, the entire amount would become due, when required by the mortgagee, and on default of payment of interest a suit for interest alone was filed. Subsequently, a suit was filed for principal and interest accrued thereafter. Under such circumstances, it was held that Order 2, rule 2 was not a bar, since the terms of the document clearly showed that there was to be a demand to enable the mortgagee to claim the payment of the principal irrespective of the period of two years fixed in the document and as it was admitted that no demand was made for the principal sum, the principal did not become payable at the expiry of the first year.

21. In the case on hand, the question of making a demand does not arise at all.

22. In *Rego* v. *Phillip Taure*[1] a review of very many decisions, it came to be held at page 591 as below:

> "The distinction between a right and a privilege is of fundamental importance and this must not be overlooked in construing the word "entitled" in Order 2, rule 2. The plaintiff, that rule says, is bound to include the whole of the claim which he is entitled to make, in other words, to which a right has accrued. The point then is, before the first suit was filed, did a right accrue to him to demand the whole amount? The matter may be put somewhat thus: The plaintiff has an option to enforce the clause or not at his pleasure. It is open to him to avail himself of that option or to waive it and there is a third alternative namely, it is equally open to him not to make election. He may by act or word show that he elects to avail himself of the benefit, and then he determines his election for ever. He may similarly indicate that he waives the option, and in that case again, he cannot afterwards change his mind. Then there is the third alternative, where he makes no election, retaining the right either to exercise the power or to waive it and this he may retain till the suit is filed. Construing Order 2, rule 2 in the light of this princi-

1. (1925) 49 M.L.J. 474: 22 L.W. 17: I.L.R. 48 Mad. 703: A.I.R. 1925 Mad. 1120.
2. (1927) 52 M.L.J. 636: 102 I.C. 187: 25 L.W. 615: A.I.R. 1927 Mad. 580.

1. (1929) 56 M.L.J. 580: 120 I.C. 853: 29 L.W. 400: A.I.R. 1929 Mad. 371.

ple, it cannot be said of a person, that on the date of the first suit he became entitled to sue for the whole amount, unless he had previously elected by some word or act to take advantage of the default clause. If he had previously done nothing, that is, had made no election, the act involved in bringing the first suit for a single instalment amounts to a waiver on his part of the benefit reserved under that clause. If again, after the default has occurred, he keeps the question open and does nothing, but finally sues for the whole amount, the fact that he has so sued shows that he has waived the benefit reserved to him under the contract."

In the instant case, as seen above, the right to sue for the entire mortgage amount accrued due on the failure to pay interest for three months and that is the acid test.

23. In *Lalta Prasad* v. *Puran Lal*[1], it was held that where under the terms of the mortgage, the mortgagee is entitled to sue the mortgagor personally for the unpaid interest and the mortgagee sues the mortgagor for such interest praying for a personal decree, without seeking any relief against the mortgaged property, his subsequent suit for sale in enforcement of the mortgage will not be barred by anything said in Order 2, rule 2.

24. By a reading of Exhibit A-1 it is clear that there is no personal covenant to pay interest. This ruling is also distinguishable.

25. On the same reasoning *Ramnath* v. *Karnindan*[2] should also be held inapplicable since in that case, there was an independent and distinct obligation on the part of the mortgagor to pay interest, even if the principal had not fallen due.

26. The question that arose in *Puran Chand* v. *Har Parshad*[3], was whether the right of the mortgagee to recover money from the mortgagor personally and the right to realise the security were independent and distinct causes of action. It was held that they were independent causes of action. But, here no such question arises.

27. Turning to *Chunnilal* v. *Amir Ahmedi Bee*[1], I find, as rightly contended by Mr. S. Padmanabhan, that that is the authority directly on the point. The facts of the case were as follows :—

28. The defendants on 27th May, 1942, through a registered mortgage deed mortgaged the suit property with the plaintiff for a sum of Rs. 11,000 agreeing to pay the mortgage amount together with interest payable every month and compoundable every year within five years with a further stipulation that if they failed to pay interest for six months the plaintiff would be entitled to recover the arrears of interest or the whole of the amount notwithstanding the stipulation for payment in five years. The defendants made default in payment of the monthly instalments of interest. The plaintiff filed a suit on 24th June, 1950 for recovery of interest amount. The suit was decreed *ex parte*. Thereafter the plaintiff filed the present suit for recovery of the principal amount on 1st September, 1952.

Under these circumstances, it was held:

"The previous suit which was filed by the plaintiff for recovery of the interest amount was instituted after the expiry of the stipulated period of five years. Inasmuch as at the time of the filing of the previous suit the principal amount had already become due, it was obligatory on the plaintiff to have included the claim for the principal amount also along with the claim for interest. As the plaintiff had not included this amount in the previous suit, the present suit for the recovery of the principal amount would be barred by Order 2, rule 2. A bare mention by the plaintiff in his earlier suit of the reservation of his right to file a separate suit for principal and the defendant's failure to deny the same in that suit could not give the plaintiff a fresh cause of action creating a separate contract."

1. A.I.R. 1930 All. 286.
2. A.I.R. 1963 Raj. 160.
3. A.I.R. 1935 Lah. 672 (F.B.).

1. (1958) 2 An.W.R. 286: A.I.R. 1958 Andh. Pra. 608.

29. A feeble attempt was made by Mr. T. R. Mani, learned counsel for the appellant that in view of the provisions of Order 34, rule 14, Code of Civil Procedure, which according to him, must be construed as an exception to Order 2, rule 2 it should be held that the present suit was maintainable. The object of Order 34, rule 14 is, to prevent the mortgagee from bringing to sale the bare equity of redemption in execution of a money decree, which he may have obtained in respect of a claim under the mortgage. Therefore, the contention of the learned counsel that Order 34, rule 14 is an exception to Order 2, rule 2 is without any substance.

30. No doubt, it is a hard case. But, sympathetic consideration cannot override the well established principles adumbrated in the Code of Civil Procedure. As laid down by the Privy Council in *Kishan Narain* v. *Pala Mal*[1], "it is the duty of the Courts to interpret and carry into effect these rules uninfluenced by the consideration of the individual loss that may be occasioned by disobedience of the provisions".

31. In the result, I am unable to see any error of law in the concurrent judgments of the Courts below. Consequently, the second appeal will stand dismissed. However, there will be no order as to costs. No leave.

32. I thank Mr. S. Padmanabhan, who acting as *amicus curiae*, rendered valuable assistance in deciding this case.

R.S. — *Appeal dismissed.*

1. (1923) 44 M.L.J. 123 : 50 I.A. 115 : 72 I.C. 187.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—T. *Ramaprasada Rao*, *J*.

Kamakshi Ammal and others .. *Petitioners**

v.

Pappathi *alias* **Kamalambai** .. *Respondent.*

Tamil Nadu Cultivating Tenants Protection Amendment Act (XXI of 1972), section 3—Suit for arrears of rent—Second Appeal by tenant—Judgment-debtor—Deposit of rent into Court—Second Appeal dismissed—Act XXI of 1972 passed—Whether judgment-debtor can claim refund of the Court deposit.

A landlord filed a suit for arrears of rent against the tenant and this was decreed on first appeal. The tenant went on second appeal where he was asked to deposit half the amount into Court. Finally the second appeal was dismissed. After this Act XXI of 1972 came to be passed. The legal representatives of the plaintiff filed an application for payment out of the amount. This was objected to by the legal representative of the judgment-debtor who claimed the benefits of Act XXI of 1972.

Held, when the Legislature has designedly used the expression 'outstanding' (in section 3), it means that if the tenant had already paid in full or in part the rent payable, he had no right to seek for recovery of it from the landlord. It was only such part of the rent which remained as arrears or which was outstanding on the notified date that was wiped out under the beneficial legislation. In the instant case, the amount in Court deposit could not be said to be arrears of rent or an outstanding rent. It had lost the impress of rent because of the peculiar situation when the money came to Court pursuant to orders of Court. Taking all these into consideration, the heirs of the landlord were entitled to the amount in Court

*C.R.P. Nos. 1008 and 1009 of 1974.
24th *January*, 1975.

deposit and not, the legal representative of the judgment-debtor. [*Para.* 8.]

Cases referred to:—

Sheo Ghalam Sahoo v. *Rabut Hussain*, (1879) I.L.R. 4 Cal. 6; *Ramaiah Ayyar* v. *Gopala Iyer*, (1918) I.L.R. 41 Mad. 1053: 35 M.L.J. 355; *Chowthmul* v. *Calcutta W. and S. Assn.*, A.I.R. 1925 Cal. 415; *Bird* v. *Barstow*, (1882) 1 Q.B. 94; *Ex parte, Banner*, In re *Keyworth*, (1874) 9 Ch.A. 365.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Munsif, Tiruvarur in E.A. No. 577 of 1973 in O.S. No. 40 of 1962 etc.

M. Srinivasan, for Petitioner.

R. Sitaraman for *K. Raman*, for Respondents.

The Court made the following

ORDER:—The petitioners sought for a refund of a sum of Rs. 979.50, which is in court deposit, pursuant to interim orders made by this Court, whilst the respondents equally claim that that amount is payable to them, as the same was deposited by them into Court as per orders of Court and that the petitioners have no right, title or interest therein. The petitioners' predecessor-in-interest was the landlord and the first respondent was his tenant of agricultural lands in the district of Thanjavur. He filed a suit O.S. No. 40 of 1962 on the file of the District Munsiff Court, Tiruvarur, for the recovery of arrears of rent by then payable by the first respondent-first defendant. The trial Court dismissed the suit. The first plaintiff in that suit took up the matter further in appeal to the District Court, Nagapattinam in A.S. No. 76 of 1964 and the same was allowed. The tenant-defendant preferred an appeal to this Court in S.A. No. 1061 of 1966, and sought for stay of execution of the decree. This Court directed the defendant to deposit one half of the decree amount and to give security for the other half. Pursuant to the said orders, the defendant deposited the said sum. The second appeal was, however, dismissed. In the course of this litigation the first plaintiff died and plaintiffs 2 to 9 are his legal representatives; even so the first defendant died and the second defendant is his legal representative. Plaintiffs 2 to 9 were added as the legal representatives of the deceased first plaintiff and the second defendant as the heir of the first defendant was added as his representative and was recognised as a person entitled to the benefits of the cultivating tenant under the Tamil Nadu Cultivating Tenants Protection Act. After the passing of the Tamil Nadu Act XXI of 1972, the second defendant deposited the arrears of rent payable for fasli 1381 and sought for a declaration from the revenue Court that the arrears of rent by then payable has been wiped out. She obtained such a declaration. After obtaining the same, she (respondent in the C.R.P.) filed E.A. No. 577 of 1973 in O.S. No. 40 of 1962 on the file of the Court of the District Munsif, Tiruvarur, seeking for a refund of the sum of Rs. 979.50 paid by the first defendant (her predecessor-in-interest) as that amount belongs to her and that plaintiffs 2 to 9 have no right, title or interest in it. This was resisted by the legal representatives of the decreeholder (petitioner in the C.R.P.). Their case was that they were entitled to the amount in Court deposit in preference to the second defendant as heir of the judgment-debtor. Furthering this aspect plaintiffs 2 to 9, who are the petitioners herein, filed an independent application under section 151, Civil Procedure Code read with Rule 163 of the Civil Rules of Practice for payment out of the aforesaid sum of Rs. 979.50. According to the petitioners the amount deposited in Court has become payable to them and has become their property no sooner the second appeal was dismissed. The respondent (the heir of the judgment-debtor) cannot take advantage of Act XXI of 1972, and seek for a refund of the aforesaid amount on the foot that the said amount represented outstanding arrears of rent as on the 30th June, 1971 within the meaning of section 3 (1) of the said Act. The fact remains that the petitioners did not withdraw the amount soon after the dismissal of the second appeal and before the

induction of Act XXI of 1972. The learned District Munsif was of the view that the decree obtained by the first plaintiff in the original suit was a decree towards rent and that, therefore, such a decree for payment of the rent became unenforceable by reason of Act XXI of 1972. He was also of the view that the decree-holder as at present by withdrawing the said amount cannot enter part satisfaction of the decree as on date. In the light of the above reasoning he upheld the contention of the cultivating tenant and was of the view that the legal representatives of the first plaintiff were not entitled to the payment of the money in Court deposit. It is as against this, the present civil revision petitions have been filed by the heirs of the landlord.

2. The contention of Mr. M. Srinivasan learned counsel for the petitioners, is that the learned District Munsif was wrong in having entered into a discussion about the enforceability or otherwise of the decree and as the amount deposited has become the property of the decreeholder, the respondents cannot claim any interest in it, as the judgment-debtor or the legal representatives of the judgment-debtor. On the other hand, it is said that as long as the decree-holder did not seek for payment out of the amount and as the dismissal of the second appeal cannot have any bearing on the issue, the amount always belonged to the judgment-debtor; it is claimed that the order of the lower Court is correct.

3. In a case like this it is essential to view the subject on a broader perspective as any other approach to it may lead to inequitable results. When the money, was deposited by the judgment-debtor as a condition precedent for the grant of stay at the time when the second appeal was admitted, then such money so deposited into Court is in *custodia legis* and is no longer under the control of either the judgment-debtor or the decree-holder. Once the second appeal has been dismissed, the money so deposited and which is in the custody and control of the Court automatically becomes the property of the decree-holder and he has a vested right in him to withdraw the said amount. The mere lapse on his part to take out a petition for withdrawal of the amount soon after the dismissal of the second appeal will not militate against him nor will it adversely affect his vested right. When once the second appeal has been dismissed, and in consequence the decree for money, though for arrears of rent, has been upheld by this Court, then the money deposited by the judgment-debtor loses its character as arrears of rent. It is simply the country's coin, which the decree-holder is entitled to as a result of the money decree obtained by him. Such a vested right which enables him to withdraw the amount in court deposit would not make that amount an 'outstanding rent' payable by the cultivating tenant—judgment-debtor. The relief granted under section 3 of the Tamil Nadu Cultivating Tenants Arrears of Rent (Relief) Act, 1972 (XXI of 1972), is to the effect that all arrears of rent payable by a cultivating tenant to the landlord and outstanding on the 30th June, 1971 shall be deemed to be discharged, whether or not a decree or order has been obtained therefor.... The question is whether that portion of the amount which has been deposited by the cultivating tenant into Court in legal proceedings pursuant to the orders of Court as stated above can any longer be impressed with the badge of rent which can be said to be outstanding and payable by the cultivating tenant. A metamorphosis has come in. The cultivating tenant has paid money into court and this money will find its level and way according to the decision in the second appeal and once the second appeal filed by the judgment-debtor has been dismissed there is an automatic vesting of a right to collect that money in Court deposit in the decree-holder and the said amount can no longer be characterised as arrears of rent or rent which was outstanding on the notified date.

4. The above subject has come up, though not under similar circumstances, but in a broader perspective in Courts of law. In *Sheo Chalam Sahoo* v. *Rabut Hussain*[1], a Division Bench of the Calcutta High Court as early as 1878 took the view

1. (1879) I.L.R. 4 Cal. 6.

that when the money is deposited in Court, the Court holds the deposit in trust for, the decree-holder and the Court is at liberty to pay it over to the decree holder based on his success in the legal proceedings.

5. In *Ramaiah Ayyar* v. *Gopala Iyer*[1], the defendant was arrested before judgment and was ordered to be released from custody on depositing into Court a sum of money sufficient to meet the plaintiff's claim in the suit. There was subsequently an attachment of the money by the decree-holder and an adjudication of the defendant as an insolvent. Courts Trotter, J., as he then was, speaking for the Bench, said that the money paid into the general credit of the action, is charged with a lien in favour of the plaintiff obtaining a decree in his favour and the Official Assignee cannot claim any preference over the title of the plaintiff over the said property.

6. In *Chowthmul* v. *Calcutta. W and S. Assn.*[2], a similar view was taken by the Division Bench of that Court, Sanderson, C.J., approving of a decision in *Bird* v. *Barstow*[3], said that the amount paid into Court under the circumstances similar to the one under consideration was the money of the plaintiff in that suit subject to his succeeding in the appeal. The learned Chief Justice also added quoting *Ex parte Banner, In re Keyworth*[4], that the money which was paid into Court belonged to the party who might be eventually found entitled to the sum.

7. The ratio of the above decisions make it clear that the plaintiff decree-holder has a lien over the amount deposited in Court by the judgment-debtor and the Court holds the said amount in trust for the person who might ultimately succeed in the section. There is only a postponement of the right of the plaintiff to receive the said amount which is necessitated because of the pendency of the second appeal. As soon as the second appeal is disposed of against the judgment-debtor *ea instanti* the decree-holder is the person, who is entitled to the said amount, as on the date when it was deposited it belonged to him and there was only a postponement of the right to collect the money because of the pendency of the civil proceeding.

8. The supervening legislation did not have any impact on the situation. The words deployed in section 3 of Act XXI of 1972 are 'all arrears of rent and 'all outstandings as on 30th June, 1971' are wiped out. The question is whether the Court deposit which is in the custody of Court and which is held by the Court in trust for the successful party, can be said to be an outstanding or arrears of rent within the meaning of the expressions used in section 3 of the Act. When the legislature has designedly used the expression 'outstanding' it means that if the tenant has already paid in full or in part the rent payable, he has no right to seek for a recovery of it from the landlord. It is only such part of the rent which remained as arrears or which was outstanding on the notified date that is wiped out under the beneficial legislation. In the instant case the amount in Court deposit cannot be said to be arrears of rent or an outstanding rent. It has lost the impress of rent because of the peculiar situation when the money came to Court pursuant to orders of Court in an application for stay of the execution of a money decree. Taking all these factors into consideration I am of the view that the petitioners are entitled to the amount in Court deposit and not the respondents.

9. The order of the lower Court is, therefore, set aside and the Civil revision petitions are allowed, but there will be no order as to costs.

S.J. ——— *Petitions allowed.*

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1. (1918) I.L.R. 41 Mad. 1053 : 35 M.L.J. 355.
2. A.I.R. 1925 Cal. 415.
3. (1882) 1 Q.B. 94.
4. (1874) 9 Ch. Ap. 365.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, CJ.* and *S. Natarajan, J.*

Parvathiyammal .. *Appellant**

v.

Sivathanu Pillai .. *Respondent.*

Travancore Cochin Compensation for Tenants Improvements Act (X of 1956), section 17—Civil Procedure Code (V of 1908), Order 23, rule 3—Suit for recovery of possession—Compromise —Improvements effected by tenant subsequent to compromise—Whether entitled to compensation—Compromise decree—Not a contract.

The Travancore Cochin Compensation for Tenants Improvements Act, 1956 came into force on 31st December, 1966. But the compromise decree in the suit by the landlord against the tenant was in 1947. The appellant-tenant contended that the compromise decree should be regarded as a contract for the purpose of application of section 17 of Act X of 1956 and that he was entitled to compensation for improvements effected by him.

Held: The compromise decree could not in any sense be equated to and be regarded as the same or as equivalent to a contract. Once a decree based on a compromise has been made, the compromise has merged in it and what operates is the decree to which the seal of the authority of the Court in attached. On that view, section 17 will have no application to the instant case. [*Para.* 3.]

Cases referred to :—

Raja Kumara Venkataperumal Raja Bahadur v. *Thotha Ramaswami Chetti*, (1912) I.L.R. 35 Mad. 75: 21 M.L.J. 709; *Subba Rao* v. *Jagannatha Rao*, (1964) 2 S.C.J. 518 : (1964) 2 S.C.R. 310: A.I.R. 1967 S.C. 591.

Appeal under Clause 15 of the Letters Patent against the order of Krishnaswamy Reddy, J., in C.M.A.No. 372 of 1970.

* L.P.A. No. 32 of 1972.

3rd April, 1975.

K. Parasaran for *A. Venkatachalam,* for Appellant.

S. Padmanabhan and *R.G. Rajan,* for Respondent.

The Order of the Court was made by

Veeraswami, CJ.—The third defendant is the appellant. The only question in this appeal is whether the 3rd defendant would be entitled to the benefits of section 17 of the Travancore Cochin Compensation for Tenants Improvements Act, 1956. There is a small history which has to be briefly stated to appreciate the question. Originally, two items of properties, one of an extent of 16½ acres waste land and the other a building site, belonged to the Sastha temple of Esthamozhy village. The trustees entrusted those items to one Arumukam Pillai for improving the property and converting the same into a garden land or paddy land. Improvements were subsequently effected by Arumukam Pillai. In consideration of claiming and planting trees on the land and putting up a certain construction for keeping a watchman, Arumukam Pillai was enjoying the usufruct therefrom. The trustees in O.S. No.10 of 1123 on the file of the Subordinate Judge, Nagercoil, sought to recover possession. But the suit ended in a compromise decree according to which Arumukam Pillai was entitled to continue to be in possession and enjoyment of the properties in lieu of the improvements made by him on the properties without paying any amount to the trust and he should deliver possession of the properties with all the improvements made by him without any objection whatever, excepting the standing crops on 1st December, 1960. One of the terms of the compromise which was embodied in the decree was that Arumukam Pillai should make no further improvement in the properties and that if he did make such improvements, the trust would not be liable therefor. At the end of the term in execution there was divergence of opinion between the Subordinate Judge and the District Judge, the latter taking the view that the compromise decree was executable. On that view, he remitted the execution petition to the Subordinate Judge for making an enquiry under sections 5

and 8 of the Travancore Cochin Act X of 1956 for the assessment of the value of improvements and to give a finding about the claim made by Arumukam Pillai for improvements subsequent to the date of the compromise decree or for revaluation any of improvements already valued to the extent to which the defendant was entitled to make any such claim under section 5 (3) of the Act. There was an appeal against the judgment of the District Judge, but it failed. The Subordinate Judge accordingly found that the legal representatives of Arumukam Pillai were not entitled to the value of improvements in respect of item 1 and that they were not also entitled to mesne profits in respect of item 2 as according to him Arumukam Pillai was put in possession of item 2 as well. On that view, the Subordinate Judge did not go into the question of assessment of improvements made in respect of item 1 or the mesne profits in respect of item 2. The 3rd defendant, who was one of the legal representatives of Arumukam Pillai, appealed to this Court which was disposed of by Krishnaswamy Reddy, J. He held that the appellant was not entitled to the value of the improvements made subsequent to the date of the compromise decree and that therefore the Subordinate Judge was right in not going into the question of assessment of the value of improvements. The appeal under the Letters Patent is by the aggrieved 3rd defendant.

2. The related section we referred to above reads :

> "Nothing in any contract entered into before the commencement of this Act shall take away or limit the right of a tenant to make improvements and to claim compensation for them in accordance with the provisions of this Act: Provided that nothing herein contained shall affect any agreement in writing registered and made after the effecting of the improvements settling the amount of compensation due therefor at the date of such agreement: Provided further that this section shall not operate against any contract whereby by the tenant's right to make improvements in the nature of buildings or to claim value of improvements therefor has been taken away or limited."

The Subordinate Judge rightly stated the purport of this section to be that any contract subsisting before the commencement of the Act should not have the effect of taking away the right of the tenant to make improvements and to claim compensation for the same. The Act came into force on 31st October, 1966. But the compromise decree in O.S. No. 10 of 1123 on the file of the Subordinate Judge, Nagarcoil, was in 1947. What is contended by Mr. Parasaran for the appellant is that, though there was a compromise decree, it should only be regarded as having the effect of a contract for the purpose of application of the said section. In support of his contention he relied on *Subba Rao* v. *Jagannadha Rao*[1] and *Rajakumara Venkataperumal Raja Bahadur* v. *Thatha Ramaswami Chetti*[2]. We do not think that either of these cases helps him. In the first of these cases, the question was one of *res judicata*. It was held by Hidayatullah, J., who spoke for the Court—

> "The compromise decree was not a decision by the Court. It was the acceptance by the Court of something to which the parties had agreed. It has been said that a compromise decree merely sets the seal of the Court on the agreement of the parties. The Court did not decide anything. Nor can it be said that a decision of the Court was implicit in it. Only a decision by the Court could be *res judicata* whether statutory under section 11, Civil Procedure Code, or constructive as a matter of public policy on which the entire doctrine rests.

The last sentence in the excerpt makes the points clear that for purpose of *res judicata* an earlier compromise decree cannot be taken as adjudication, which is essential for the application of the doctrine of *res judicata*.

3. *Raja Kumara Venkataperumal Raja Bahadur* v. *Thatha Ramaswami Chetti*[2], also had to do with *res judicata* and the Court observed—

> "The test for determining whether there is an estoppel in any particular

1. (1964) 2 S.C.J. 518 : (1964) 2 S.C.R. 310 : A.I.R. 1967 S.C. 591.

2. (1912) I.L.R. 35 Mad. 75: 21 M.L.J. 709.

case in consequence of decree passed on a compromise is whether the parties decided for themselves the particular matter in dispute by the compromise and the matter was expressly embodied in the decree of the Court passed on the compromise or was it necessarily involved in or was it the basis of, what was embodied in the decree."

Then it proceeded to state what was the basis of a compromise decree, namely, the contract between the parties containing the compromise and observed—

> " At the same time such a decree cannot be regarded as a mere contract, and has got a sanction far higher than an agreement between parties. The parties to the decree cannot therefore put an end to it at theirpleasure in the manner that they could rescind a mere contract. Nor can it be impeached on some grounds on which a mere contract could be impeached such as absence of consideration or mistake. "

This decision makes it quite clear that although the basis of a compromise decree is the contract entered into between the contending parties, the decree could not in any sense be equated to and be regarded as the same or as equivalent to the contract. Once a decree based on compromise has been made, the compromise has merged in it and what operates is the decree to which the seal of the authority of the Court is attached. On that view, the above section will have no application to the instant case.

4. The appeal is dismissed with costs.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—*V. Ramaswami, J.*

The Management of the Hindu (Messrs Kasturi & Sons United), 201-A, Kasturi Buildings, Mount Road, Madras-2 .. *Petitioner**

v.

The Presiding Officer, Labour Court (Principal), Madras and others .. *Respondents.*

and

K.R. Venkatesan and others .. *Petitioners*

v.

The Presiding Officer, Labour Court, Madras and another .. *Respondents.*

Working Journalists (Conditions of Service) and Miscellaneous Provisions Act (XLV of 1955), *sections* 12 *and* 13—*Wage Board's recommendations—Government order thereon—Classification of working journalists —Claim by certain employees to benefits—Index Assistants etc.—Tenability of claim.*

Words and Phrases—' Working Journalists', Library or Index Assistant, Current stories, etc.,—Meaning.

The meaning of ' Librarian or Index Assistant' is neither obscure nor complicated. 'Current Stories' referred to in the definition of that term are articles or leaders or news items on current state of affairs, events, matters, topics, issues, problems, solutions to problems, and so forth. " Story" is, among others, "a narrative of incidents in their sequence, a theme or account, report or statement or allegation or newspaper article " Current story" is, in the newspaper office, written by a person in the Editorial Department. For the preparation of these stories, the writers may require background material from which they could spin out their views or for such other purpose including accuracy in statement and complete news. These background ma-

*W.P. Nos. 75 and 627 to 629 of 1974.
19*th September*, 1975.

terials have, therefore, to be from the sources already in existence. A person who prepares and maintains these background materials is designated as 'Index Assistant' or 'Librarian' in the Recommendations of the Wage Board. All materials which help the preparation with accuracy and completeness or enliven the current story, could certainly form the background material whether they are published or unpublished record or original thinking. The words 'prepares or maintains' are also of wide amplitude in their meaning and may cover a wide range of activities. Collection of material, sifting the mass of details, identifying the relevant material useful for future reference, arranging itemwise, codifying and indexing such materials in an orderly manner and finally locating the required information at a moment's notice would certainly amount to preparation and maintenance of such matters. [*Para.* 4.]

The facial reaction or appearance of a person in a particular situation would certainly amount to news. How a certain expert or a master in sports meets a challenging situation would also amounts to news and it is not necessary to multiply instances as even photographs would be matter relating to news and views and would form background material.

[*Para.* 6.]

Held, that the petitioner-employees satisfied, in the instant case, the functional definition of 'Librarian or Index-Assistant' and were entitled to the benefits of the recommendations of the Wage Board.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the respective affidavits filed therewith, the High Court will be pleased to issue writs of *certiorari* (1) call for the records in W.C. Case No. 1 of 1969 on the file of the Labour Court (Principal), Madras and quash the Award passed therein dated 20th November, 1973 and published in Supplement to Part II, section I of the Tamil Nadu Government Gazette dated 19th December, 1973 and printed at pages 17 to 20 thereof in W.P. No. 75 of 1974 and (2) calling for the records relating to the award of the Labour Court, Madras, the first respondent in all the petitions and dated 20th November, 1973 in W.J. No. 1 of 1969 and quash that part of the said order which negatives the claim of the respective petitioners in W.P. Nos. 627 to 629 of 1974.

M.R. Narayanaswami, for Petitioner in *W.P.* No. 75 of 1974.

M. Krishnappan, for Petitioners in W.P. Nos 627 to 629 of 1974.

M.R. Narayanaswami, for Second Respondent in W.P. Nos. 627 to 629 of 1974.

M.K. Nambiar for *V. Manivannan*, for Respondents Nos. 2 to 10 in W.P. No. 75 of 1974.

S. Ramalingam, Assistant Government Pleader for first respondent in all the petitions.

The Court made the following

ORDER.—In exericse of the powers conferred on them by section 9 of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (Central Act XLV of 1955), as amended (hereinafter referred to as the Act) the Central Government constituted a Wage Board by a notification dated 12th November, 1963, for the purpose of fixing or revising the rates of wages in respect of working journalists in accordance with the provisions of the Act. The Wage Board consisted of representatives of the employers in relation to newspaper establishments, working journalists and independent persons. On receipt of the recommendations of the Wage Board, the Government of India made an order under section 12 of the Act and it was notified on 27th October, 1967. By virtue of the provisions of section 13, on the coming into operation of the order of the Central Government under section 12, every working journalist became entitled to be paid by his employer wages at the rates specified therein. In the recommendations of the Board, the working journalists were classified and grouped for the purpose of fixing their rates of wages. One such grouping is found in paragraph 4.24 (I) (*a*) III of the Recommendations, which reads as follows :—

"Reporter, Sub-Editor, Correspondent, News Photographer, Calligraphist, Artists, Librarians and Index Assistants and all Working Journalists other than those mentioned under any other group unless placed higher by the establishment."

The newspaper establishments were also classified into various classes, which need not detain us here. Schedule I to the Recommendations defines certain words used in the Recommendations. "Librarian or Index Assistant" is defined as "a person who prepares and maintains matters relating to news and views which are used as background or filled out for current stories' and it is further added that "persons not performing any of these functions shall not be covered". On the ground that they are Index Assistants, eleven of the employees of the Management of the Hindu made a demand for payment of the amounts due to them as per the Wage Board's Recommendations. One other employee, claiming himself to be an Assistant Librarian, also made a demand for payment on the basis of the Wage Board's Recommendations. They also communicated to their employers their option for the new scale of pay under the Wage Board's Recommendations in accordance with Paragraph 4.32.6 thereof. Since their claims were not accepted or complied with, they filed applications under section 17 to the State Government, for the recovery of the amounts due to them. Since the management contested the claims of the said employees, the Government, in G.O. Rt. No. 570, Labour, dated 5th July, 1967, referred under section 17 (2) the question of recovery of the sums to the Labour Court, Madras, for adjudication. It was contended by the Management before the Labour Court that a Wage Board constituted under the Act could fix or revise the rates of wages in respect of "Working Journalists" as defined in the Acts and they had no jurisdiction to go beyond the definition or create fresh categories of persons not covered by the definition and confer on them the statute of Working Journalists so as to be eligible for the benefits under the Wage Order. They further contended that these employees were appointed as clerks; that they are doing only clerical duties in the Index Department, that they are not preparing or maintaining matters relating to news and views which are used as background or filled out for current stories and that therefore they do not satisfy the definition of "Librarian or Index Assistant."

2. The Labour Court accepted originally the contention of the Management that the Wage Board had no jurisdiction to categorise Librarians and Index Assistants as working journalists and in that view, by an order dated 19th December, 1971, held that the employees were not entitled to the reliefs prayed for by them. Aggrieved by this award, the employees filed W.P. No. 1146 of 1971 under Article 226 of the Constitution. This Writ Petition was allowed on the ground that the Labour Court had exceeded its jurisdiction in declaring that the Wage Board could not have included Index Assistants in the category of Working Journalists. This order of the learned single Judge was confirmed in appeal and the petition for leave to appeal to the Supreme Court was also not successful. While disposing of the writ appeal, this Court also directed the Labour Court to decide the question whether the employee in this case satisfied the definition of the Wage Board for "Librarian or Index Assistant" on the basis of the evidence on record. In the revised order of the Labour Court dated 20th November, 1973 it was held that except in respect of three of the employees, the duties performed by them clearly satisfied the functional definition of "Index Assistant" contained in the Recommendations of the Wage Board and that therefore they were entitled to the amounts claimed by them. Out of the three employees whose petitions were rejected, the Labour Court held that two were merely Photo Filing Clerks attached to the Index section, that their function was only to file photos, both published and unpublished, and supply them as and when required in any department and that therefore they cannot be fitted in the definition given by the Wage Board. The third man was held to be merely a clerk who assisted a Librarian under whom he worked

and therefore it was held that he could not claim the status of a Working Journalist. As against the finding that nine of the employees satisfied the definition of Index Assistant in the Recommendations of the Wage Board, the Management has filed W.P. No. 75 of 1974. The employee who was held to be an Assistant to the Librarian and not a Working Journalist has filed W.P. No. 627 of 1974, challenging the finding of the Labour Court. The other two employees, who were held to be more Photo Clerks, have filed W.P. Nos. 628 and 629 of 1974. In all these writ petitions, the prayer is for the issue of a writ of *certiorari* to quash the order of the Labour Court in so far as it is against them.

3. The main argument of the counsel for the Management in respect of all these employees was that they were appointed only as clerks, that they are designated as clerks and that they are doing only clerical duties in the Index Department. Their duties are to arrange and maintain subjectwise an index of published news items and cuttings of important items of news. They do not prepare and maintain any background material for the use of the Editorial Department. It was further contended that the Photo Filing Clerk attached to the Index Department does not have any function, apart from filing of photos, both published and unpublished, and supplying them as and when required in any department. Thus, none of them perform any of the functions assigned to the Index Assistant in the Wage Board's Recommendations and that therefore they are not entitled any benefit as per their recommendations.

4. In the Recommendations, the Wage Board has clearly stated, in paragraph 4.26 that it is the principal duties performed by an employee that should determine the category of such employee and that neither the designation nor casual or occasional work should be taken into account for such categorisation. Therefore if the employees in the instant case are doing the functions referred to in the definition of Index Assistant, the mere fact that they were employed originally as clerks and were designated as such would not be of any consequence. The main question, therefore, for consideration is whether all these employees satisfy the functional definition of "Librarian or Index Assistant" given by the Wage Board in their Recommendation. That definition has already been extracted. To me, the meaning of this definition is neither obscure nor complicated. "Current Stories" referred to in that paragraph are articles or leaders or news items on current state of affairs, events, matters, topics, issues, problems, solutions to problems and so forth. The dictionary meaning given to the term "story" is, among others, "narrative of incidents in their sequence, a theme, account, report or statement or allegation or a newspaper article." This "current story" is written by a person in the Editorial Department. For preparation of these current stories, the writers may require background material from which they could spin out their views or for such other purpose including accuracy in statement and complete news. These background materials have, therefore, to be from the sources already in existence. A person who prepares and maintains these background materials is designated as 'Index Assistant or Librarian" in the Recommendations of the Wage Board. It was the contention of the learned counsel for the Management that preparation and maintenance contemplated in the definition is not indexing or classifying matters relating to news and views which had already appeared in the press and furnishing the same as and when required but refers to matters of original nature prepared and maintained by such persons. I am unable to agree with this restricted meaning given by the learned counsel for the Management. There is nothing in the definition that the matters relating to news and views which are used as background material or filled out matter should not have been published ones. All the materials which help the preparation with accuracy and completeness or enliven the current story, could certainly form the background material, whether they are published or unpublished record or original thinking. The words 'prepares and maintains' are also of wide am-

plitude in their meaning and may cover a wide range of activities. Collection of material, sifting the mass of details, identifying the relevant material useful for future reference, arranging itemwise. codifying and indexing such material in an orderly manner and finally locating the required information at a moment's notice as a computer does, would certainly amount, in my opinion, to preparation and maintenance of such matters.

5. The evidence of P.Ws. 1 to 4 and the documents Exhibits P-1 to P-24 show that all these employees are concerned with the preparation and maintenance of matters relating to news and views which are used as background material. They perform the following functions as found in the evidence : They receive many pamphlets, bulletins, magazines, periodicals, gazettes, bills, etc., either sent from the Assistant Editor or otherwise. They divide the published items into Indian News, Foreign News, legal items, sports, special articles, photos, maps and cartoons and also mofussil items and clippings of the published items. These are also taken out on the basis of the importance of the subject. For Indian News, they study the items and decide what is important and reject such things as are not important. From the important news and views, they prepare a list of them and record them in a note book. In respect of some specialised subjects like commerce and finance, the figures relating to production, export, import and loan agreements are selected from both the Hindu paper as also from press bulletins, handouts and other magazines. They make clippings of these and make them readily available to the Editorial Department whenever they ask for them. Nobody gives instructions to them as to how these materials are to be gathered. The employees use their initiative in accordance with their importance. They do not confine their work to the materials published in the Hindu, but also get matters from other papers, magazines and bulletins. The Management had not laid down any duties for them in writing. They maintain registers like the Index Volumes, Reference Register, General Information File, File relating to abbreviations and expressions, Cutting Lending Register, Photo Book, Reference File, Profile Folders, Magazine Register and various other types of similar, easily referable registers. In the Index Volume, they also make cross-references. For example, when a person speaks about a particular subject, they refer to the earlier speech on the same subject by someone also. In the General File, they make note of important events that had taken place some years ago and which are often asked by the Editorial Department as well as outsiders. P.W. 1 has given some illustrative examples of the information available there *viz*. how many times Gandhiji visited South India, when the yellow 2 anna coins ceased to be legal tender, when Indian time was advanced and when it was restored and when Madras was shelled by Emden, when the first satellite was launched and similar other important events. In the reference File, they enter the information Relating to specialised subjects like commerce and finance. From the Cutting Lending Register, they could supply biographies, background materials on particular subjects and similar matters. The Photo Book covers both published and not published photos. In the Profile Folders, Profiles of important personalities are gathered. From the magazines valuable and useful material for the Editorial Department, whenever they ask for them, are supplied. When these employees in the Index Departmemt receive querries from the Editorial Writer, Assistant Editors, Sub-Editors, and Reporters, either in writing or throguh telephone, these employees, after referring to the subject, date and other particulars, trace the particulars required and supply them to the concerned person at very short notice. The Index Department is so huge and efficient that even the Management in their pamphlet Exhibit P-23 containing the story of the Hindu, have referred to the work of this Index Department thus : "The accuracy and background material is provided by a giant Index Department which can trace any event or comment going back to the last eighty years within a matter of minutes. There is also a big Reference Library, one of the best in the country, as also a morgue therein which is filled with over 10,000 pictures which

are used to enliven the news". These uncontradicted pieces of evidence clearly show that they are not doing merely clerical work, but that their work is in nature of preparing and maintaining matters relating to news and views which are used as background material on later occasions.

6. In respect of the two employees who are in the Photo Filing Section attached to the Index Department, the learned counsel for the Management also contended that the photos could not be said to be materials relating to news and views and that whatever may be said about the other persons employed in the Index Department, they could not be said to be preparing and maintaining any material relating to news and views which form the background matter of current story.' I am unable to agree with the learned counsel that a photograph will not be a matter relating to news or views or that it could not from a background for a current story. The facial reaction or appearance of a person in a particular situation would certainly amount to news. How a certain expert or master in a sport meets a challenging situation would also amount to news and it is not necessary for us to multiply instances as I am convinced that even photographs would be matters relating to news and views and would form the background material. In fact, in the story of the Hindu referred to above, the photos or pictures which are collected are stated to be used to enliven the news. These two employees, who are incharge of these photographs, also in their own way classify these photographs, index them in the rear, pick out the relevant photo and supply it to the Editorial Department whenever required. Though their functions might not be said to be as taxing or demanding intelligence, as in the other staff in the Index department, still they are doing the same functions as the Index Assistants and there is nothing to distinguish them from the others. The Tribunal has not given any reason as to why the Assistant Librarian was held not entitled to the claim made by him. He was referred to only as a clerk and it was stated that there is a separate Librarian in the library. But, in his evidence as P.W. 2, this Assistant Librarian has also stated that he classifies the books, periodicals, magazines and other materials according to subject, place and other particulars. He also selects important items, and makes out clippings, if necessary. He supplies information to the Editorial Department from the books, periodicals and other materials. Having regard to this evidence, I am satisfied that he is also entitled to the benefits of the Recommendations of the Wage Board.

7. One other argument advanced by the learned counsel for the Management was that though there are twelve claimants, only four of them have gone to the witness box and that therefore the claims of the persons who have not given evidence should be rejected. According to the learned counsel, the evidence of these witnesses relates to the duties performed by them alone and in the absence of any evidence relating to the duties of the other employees, they are not entitled to claim the benefits of the Wage Board Recommendations. I am unable to agree with this contention of the learned counsel. The evidence of P.Ws. 1 and 3 related to the functions of all these employees and was not restricted to their own. In fact, in the beginning of the evidence of P.W. 1, he referred to the fourteen persons working in the section, of whom twelve are the petitioners. He also stated that they are having shifts as in the Editorial Department. In respect of the functions, he always referred to the persons in plural and he did not restrict the evidence to himself. In some places, he also stated that they are all working on a co-operative basis in furnishing the information required. It should also be pointed out that though the evidence stated that there was a co-operative effect and the evidence related to the general work of all the employees in that section nobody from the Management had gone into the box to discredit the evidence. I am, therefore, satisfied that the evidence of P.Ws. 1 and 3 applied to the other employees as well and this contention of the learned counsel for the Management is not tenable.

8. In view of a my above findings, W.P. No. 75 of 1974 is liable to be dismissed and the other three petitions are to be allowed.

9. Accordingly, W.P. No. 75 of 1974 is dismissed and the rule *nisi* is discharged.

The other writ petitions are allowed and the rule *nisi* is made absolute. There will be no order as to costs in all these writ petitions.

R.S. —— *W.P. No. 75 of 1974, dismissed; Other writ petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Natarajan, J.*

Nagammal and another .. *Appellants**

v.

Krishnaswami Nayudu .. *Respondent.*

Transfer of Property Act (IV of 1882), sections 54 and 58 (d)—Usufructuary Mortgage—Equity of redemption—Whether tangible immovable property capable of sale without registered instrument where value is less than Rs. 100—Oral sale of equity of redemption by usufructuary mortgagors—Whether delivery of property could be effected without first dispossessing the mortgagee.

There is preponderance of authorities in support of the proposition that the right of a mortgagor in property usufructuarily mortgaged by him is tangible immovable property within the ambit of paragraph 3 of section 54 of the Transfer of Property Act. It is difficult to accept the contention that the said right is to be construed as an intangible thing and therefore impossible of transfer except by means of a registered instrument. [*Para.* 11.]

In case of oral sale of the equity of redemption of a usufructuary mortgage to the mortgagee no delivery of possession as contemplated by section 54 of the Transfer of Property Act is necessary when the usufructuary mortgagee is already in possession of the property. [*Para.* 12.]

Cases referred to :—

Subramaniam v. *Perumal Reddi*, (1895) I.L.R. 18 Mad. 454: 5 M.L.J. 92; *Ramaswami Pattar* v. *Chinnan Asari*, (1901) I.L.R. 24 Mad. 449: 11 M.L.J. 132; *Dwaraka Doss* v. *Danakoti Ammal*, A.I.R. 1914 Mad. 353; *Cunniah* v. *Gopal*, (1919) M.W.N. 613: 52 I.C. 879: A.I.R. 1919 Mad. 547; *Sohan Lal* v. *Mohan Lal*, A.I.R. 1928 All. 726 (F.B.); *Phoku Mian* v. *Syed Ali*, A.I.R. 1937 Pat. 178; *Tukaram* v. *Atmaram*, A.I.R. 1939 Bom. 31; *Venkatasubbamma* v. *Subbayya*, (1963) 1 An.L.T. 274: I.L.R. (1964) A.P. 199: A.I.R. 1964 A.P. 21; *Bhikhabhai* v. *Chimanlal*, A.I.R. 1953 Bom. 437 (F.B.); *Sheik Dawood* v. *Moideen Batcha*, 48 M.L.J. 264: A.I.R. 1925 Mad. 566; *S. Udayar* v. *M. Padayachi*, (1957) 1 M.L.J. 17: (1956) M.W.N. 897: A.I.R. 1957 Mad. 209.

* S.A. No. 269 of 1972. 14*th August*, 1975.

Appeal against the decree of the Court of the Subordinate Judge, Dindigul in Appeal Suit No. 84 of 1969, preferred against the decree of the Court of the District Munsif of Periyakulam in Original Suit No. 154 of 1968.

T. Rangaswami Iyengar and *A. Venkatesam*, for Appellants.

K. Alagiriswami, E. Damodaran and *R. Subbaraj*, for Respondent.

The Court delivered the following

JUDGMENT.—The second appeal raises two interesting questions as to whether the mortgagors' equity of redemption in an usufructuary mortgage created by them is tangible immovable property, capable of being sold without a registered instrument therefor where its value is less than Rs. one hundred, and secondly, if, even such a right of redemption is to be held tangible immovable property, whether delivery of the property as contemplated under section 54 of the Transfer of Property Act, can be validly effected by the mortgagors-vendors without first dispossessing the usufructuary mortgagee.

2. The appeal has come to be filed by the appellants herein in the following circumstances: One Alagiriswami Naidu, husband of the first appellant and father of the second appellant, usufructuarily mortgaged in item of property, of which the suit property is one half, to the respondent herein on 30th April, 1931 under Exhibit B-1 for a sum of Rs. 200 and in pursuance of the mortgage, the respondent was inducted into possession of the property. In or about the year 1934 Alagiriswami died leaving the appellants

(Plaintiffs in the suit) as his heirs. In the year 1960 the respondent-defendant released one half of the hypotheca and gave possession thereof to the appellants. Divergent versions are put forward by the contesting parties as to how a moiety of the hypotheca was released and given to the appellants. According to the appellants, they approached the respondent in the year 1960 for releasing a portion of the hypotheca on account of the fact that the value of the property had increased considerably and therefore a half portion of the hypotheca would be adequate security for the debt and the income therefrom would also be adequate to discharge the interest obligation, and the respondent acceded to their request and delivered possession of a half portion of the hypotheca to the appellants. According to the respondent, however, soon after the death of Alagiriswami, the first appellant received a sum of Rs. 25 from him for performing the obsequies of her husband and in consideration thereof, she, acting on behalf of herself and the second appellant who was then a minor, made an oral sale, to him, of the equity of redemption. Since then, the mortgage became extinguished and he (the respondent) was in possession of the entire hypotheca as owner. But, in the year 1960, the appellants approached him and asked him to convey back the hypotheca to them and he acceded to that request partly at the intervention of mediators and on account of the fact that the appellants had, by then, become closely related to him. It would appear that the first appellant's daughter has been given in marriage to the respondent's brother's son. The case of the respondent was that he received a sum of Rs. 100 from the appellants and effected an oral sale of a half portion of the hypotheca and it was by virtue of that sale the appellants are in possession of a portion of the property originally mortgaged. In effect, the precise stand of the appellants-plaintiffs in the suit was that the mortgage was still in force and therefore, they were entitled to exercise their right of redemption over the remaining extent of the mortgaged property in the possession of the respondent. The categorical stand of the respondent, however, was that by virtue of the oral sale of the equity of redemption in the year 1939, the right of redemption was extinguished and the appellants were not entitled to base their action on the mortgage.

3. The oral sale of the equity of redemption projected by the respondent is not evidenced by any letter or document. But, he placed reliance on the evidence afforded by some documents and the testimony of his witnesses, to prove the factum of the sale. Exhibit B-3 is a petition given by the first appellant to the Zamindar of Kandamanaickenur, within whose Zamin the hypotheca is situate, to transfer the patta of the hypothecated land in the name of the respondent in consideration of the first appellant having received a sum of Rs. 25 from the mortgagee and Exhibit B-5 is the patta issued to the respondent in terms of Exhibit B-3. Exhibit B-6, a notice issued by Alagiriswami's brother in 1945 and Exhibit B-7, the reply thereto, were also relied on by the respondent to substantiate his contention of the sale, to him, of the equity of redemption. Under Exhibit B-6, Alagiriswami's brother had warned the respondent that he had a half right over the hypotheca and consequently, any sale of the equity of redemption by the first appellant would not be binding on him. In his reply, Exhibit B-7, the respondent had met this claim by saying that the hypotheca was the absolute property of Alagiriswami and therefore, the sale of the equity of redemption in his favour was unassailable. Exhibit B-9 which relates to the sub-division of the hypotheca into two portions in 1965 was also pressed into service to show that one half of the hypotheca was given to the appellants in 1960 by virtue of an oral sale, and not, as contended by the appellants, on account of the respondent releasing a portion of the property from the mortgage. Among the witnesses examined on the respondent's side, considerable stress was laid on the evidence of D.W. 5, the village karnam, who has spoken about the patta transfer application (Exhibit B-3) given by the first appellant and the endorsement (Exhibit B-10) made by him thereon.

4. The learned District Munsif of Periakulam who tried the suit, upheld the case of the appellants and decreed the suit for redemption. He did not believe the oral sale of the equity of redemption in 1934

or the oral sale of a moiety of the hypotheca in 1960. In the appeal preferred by the rsepondent, the learned Subordinate Judge of Dindigul took a different view of the matter and held that the mortgage was extinguished on account of the oral sale of the equity of redemption and the giving away of a portion of the hypotheca in the year 1960 by the respondent was not by way of release, but was by way of sale to the appellants. He therefore allowed the appeal and dismissed the appellant's suit.

5. Mr. Rangaswami Iyengar, learned counsel for the appellants, advances a three-fold argument in the appeal to contend that the Subordinate Judge should have sustained the judgment of the trial Court and ought not to have reversed the finding. The first contention is based on appreciation of evidence and the other two contentions are on questions of law. The first ground of attack on the judgment of the lower appellate Court is that there was no acceptable evidence for the Court to conclude that the first appellant had made an oral sale of the equity of redemption in 1934. On this atpect of the matter, I have already referred to the fact that the sale is not evidenced by anything in writing and the factum of the sale has been proved only from attendant circumstances. The principal document on which reliance is placed is Exhibit B-3, *viz.*, the patta transfer application given by the first appellant. There is some confusion in the minds of the Courts below about Exhibit B-3, *viz.*, as to whom the petition was addressed and as to the averment therein about the person from whom the first appellant had received money. The District Munsif as well as the Subordinate Judge have stated that under Exhibit B-3 the first appellant had acknowledged payment of Rs. 25 from the lessee of the hypotheca and, while the District Munsif has held that the wrong recital fortified the case of the respondent, the Subordinate Judge has held that the recital was wrong, but did not affect the genuineness of the transaction. A scrutiny of Exhibit B-3, however, reveals that the endorsement therein was in favour of the mortgagee and not any lessee, and since consent was given for transfer of the patta, the endorsement has been addressed to the Zamindar. The contention of Mr. Rangaswami Iyengar is that the first appellant would not have received a sum of Rs. 25 and sold the equity of redemption because she was possessed of other properties at that time and would not have, therefore, been compelled to raise funds for the obsequies ceremonies of her husband by selling the equity of redemption. The failure of the respondent to have obtained a receipt from the first appellant evidencing payment of Rs. 25 is also relied upon to contend that the oral sale cannot be true. Lastly, the comment made on Exhibit B-3 is that the first appellant was not confronted with this document when she was in the witness-box. It is no doubt true that the respondent had not obtained an independent receipt from the first appellant, nor was Exhibit B-3 shown to her when she was in the witness-box. Notwithstanding these features, I do not think the conclusion of the Subordinate Judge that Exhibit B-3 is a genuine document can be disturbed. Though the first appellant was not directly confronted with Exhibit B-3, she has nevertheless been made aware of the existence of the document, for, in the pleadings as well as in the cross-examination, reference has been made to this document and in her evidence, the first appellant has denied having executed such a document. It is not, therefore, as if Exhibit B-3 had been surreptitiously introduced into evidence and the first appellant was kept in the dark about the whole thing. Secondly, it is seen that Exhibit B-3 contains Exhibit B-4 which is an application by the respondent to the Zamindar for patta being transferred to his name. There is also the endorsement of D.W. 5, the karnam, therein that patta can be transferred as desired by the parties. An office-note by the Manager of the Estate, marked as Exhibit B-11, also lends credence to the patta transfer application. As pointed out by the Subordinate Judge, it will be too much to hold that all these things had been fabricated by the respondent. The subsequent conduct of the parties also is found to be in conformity with the application made in Exhibit B-3. The patta itself had been transferred to the respondent as borne out by Exhibit B-5.

6. With regard to the events of the year 1966, the appellants contend that at their request the respondent released a portion of the property from the mortgage, but it is hardly acceptable. Without payment of any money the respondent would not have released a portion of the property, even assuming that the value of the property had appreciated beyond proportion to the mortgage debt. The respondent's version that he received Rs. 100 and sold a moiety of the hypotheca to the appellants appears to be the more acceptable version, for, it is seen that in the year 1965 a sub-division has been effected of the hypotheca and the second appellant had consented to the sub-division proceedings. If really the mortgage was subsisting and the appellants were owners of the entire hypotheca, there was no need for any sub-division. As pointed out by the Subordinate Judge, the second appellant seems to have been kept out of the witness-box lest he be confronted with his statement during the sub-division proceedings. On this aspect of the matter too, the finding of the Subordinate Judge appears to be well-founded.

7. It is no doubt true that, for reaching the conclusion that the appellants must have made an oral sale of the equity of redemption, the Subordinate Judge was not justified in placing reliance on Exhibits B-6 and B-7. These letters were not written by or addressed to the appellants and Exhibit B-6 cannot even be deemed to have been validly proved. These documents should, therefore, have been clearly eschewed from consideration. But, even if these documents are kept out of mind, it is difficult to accept the contention of the appellants that there was no oral sale of the equity of redemption in the respondent's favour and consequently, the finding of the learned Subordinate Judge in that behalf is not unwarranted by, or opposed to evidence.

8. Having failed to assail the finding of the lower appellate Court about the truth and genuineness of the oral sale of the equity of redemption, the attempt of Mr. Rangaswami Iyengar is to render ineffective the sale on two legal grounds. The first argument of Mr. Rangaswami Iyengar is that equity of redemption, particularly in the case of an usufructuary mortgage, is an intangible property and therefore, its sale can be effected only by means of a registered instrument. In support of this contention, he places reliance on the definition of 'sale' in section 54 of the Transfer of Property Act, wherein it is stated that a transfer, in the case of a tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by way of registered instrument. On this aspect of the matter, there have been judicial pronouncements. But, unfortunately, the views expressed therein are not only different, but conflicting as well. In *Subramaniam* v. *Perumal Reddi*[1], it was held that an oral transfer of a hypothecation deed would not attract the restriction imposed by section 54 of the Transfer of Property Act that a sale of intangible thing can only be effected by means of registration. This view of the Bench was not shared by another Bench which decided *Ramaswami Pattar* v. *Chinnan Asari*[2]. Though the question for determination in that case was whether a mortgagee in possession was entitled to exercise his right of pre-emption against a transferee of the equity of redemption, Bhashyam Ayyangar, J., held (at page 463) as follows:

> "The equity of redemption in a usufructuary mortgage is only an intangible thing like 'a reversion' which immediately precedes the expression 'or other intangible thing' (*vide* Williams on 'Real Property', 18th Edition, pages 30, 31), and it can be transferred by sale only by a registered instrument and not by delivery of the property. Equity of redemption in a simple mortgage may be tangible immovable property, and its sale can be effected if its value be below Rs. 100, without a registered instrument, by mere delivery of the property. The right of a simple mortgagee in the property mortgaged is, in my opinion, only an intangible thing like a charge on immovable property within the meaning of section 54, and I am unable to concur in the decision of this Court reported in *Subramaniam* v.

1. (1895) I.L.R. 18 Mad. 454 : 5 M.L.J. 92.
2. (1901) I.L.R. 25 Mad. 449 : 11 M.L.J. 132.

Perumal Reddi[1], to the effect that a transfer by sale of a hypothecation executed to secure a debt under Rs. 100 may be made otherwise than by registered instrument."

9. Sitting singly, Wallis, J., held in *Dwarka Doss v Danakoti Ammal*[2], that the observation of Bhashyam Ayyangar, J, in *Ramaswami Pattar* v. *Chinnan Asari*[3], was purely obiter and, on the other hand, the earlier Bench decision in *Subramaniam* v. *Perumal Reddi*[1], would be binding on him to hold that a transfer of a mortgage by the deposit of title deeds does not require registration either under the Transfer of Property Act or the Registration Act. The same view was taken in *Cunniah* v. *Gopal*[4], which was a Bench decision by Wallis and Napier, JJ.

10. By way of obiter, Mukerji and Kendall, JJ., (Sulaiman, Ag.C.J. dissenting) observed in *Sobon Lal* v. *Mohan Lal*[5] as follows:

> "In selling what is popularly called his 'equity of redemption', even a usufructuary mortgagor is in reality selling the property itself and the sale of the interest of such mortgagor is of tangible property He can, therefore sell it by placing the buyer in possession of the property (provided that the property, was of less value than Rs. 100 without executing a registered instrument."

This view was adopted by a Bench of the Patna High Court in *Phoku Mian* v. *Syed Ali*[6]. So too, held the Bombay High Court in *Tukaram* v. *Atmaram*[7], the view taken being that the equity of redemption in the case of a usufructuary mortgage is tangible property capable of being transferred by an unregistered deed where the value of the property does not exceed Rs. 100. In *Venkatasubbamma* v. *Subbayya*[8] a Bench of the Andhra Pradesh High Court also concurred with the view stated above.

11. In view of the preponderance of authorities in support of the proposition that the right of a mortgagor in property usufructuarily mortgaged by him is tangible immovable property within the ambit of paragraph 3 of section 54 of the Transfer of property Act, it is difficult to accept the appellants' contention that the said right is to be construed as an intangible thing and therefore impossible of transfer except by means of a registered instrument. It is, no doubt, true that *Ramaswami Pattar* v. *Chinnan Asari*[1] expressed a contrary view, but on account of the observation being by way of obiter and there being direct rulings on the question in *Subramaniam* v. *Perumal Reddi*[2], *Dwarka Doss* v. *Danakoti Ammal*[3] and *Cunniah* v. *Gopal*[4], I am bound by the view taken in these decisions and therefore, I have to find against the contention of the appellants.

12. The last ground on which the oral sale of the equity of redemption is sought to be rendered vulnerable is based on the contention that even if the right of a mortgagor in the property usufructuarily mortgaged by him is to be held to be tangible immovable property, yet the oral sale cannot be recognised in the absence of delivery of the property. The point that is urged is that when the mortgagee is already in possession of the property mortgaged to him usufructuarily, the mortgagor who sells the equity of redemption cannot effect delivery of the property without first dispossessing the mortgagee. Support for this contention is sought to be derived from the decision of the Full Bench of the Bombay High Court in *Bhikkhabhai* v. *Chimanlal*[5], which accepted the dissenting view of Sulaiman, Ag.C.J. in *Soban Lal* v. *Mohan Lal*[6] that delivery being the essence of the transaction, there

1. (1895) I.L.R. 18 Mad. 454 : 5 M.L.J. 92.
2. A.I.R. 1914 Mad. 353.
3. (1901) I.L.R. 24 Mad. 449 : 11 M.L.J. 132.
4. (1919) M.W.N. 613 : 52 I.C. 879 : A.I.R. 1919 Mad. 547.
5. A.I.R. 1928 All. 726 (F.B.)
6. A.I.R. 1937 Pat. 178.
7. A.I.R. 1939 Bom. 31.
8. (1963) 1 An. L.T. 274 : I.L.R (1964) A.P. 199 : A.I.R. 1964 A.P. 21.

1. (1901) I.L.R. 24 Mad. 449 : 11 M.L.J. 132.
2. (1895) I.L.R. 18 Mad. 454 : 5 M.L.J. 92.
3. A.I.R. 1914 Mad. 353.
4. (1919) M.W.N. 613 : A.I.R. 1919 Mad. 547.
5. A.I.R. 1953 Bom. 437 (F.B.)
6. A.I.R. 1928 All. 726 (F.B.).

cannot be delivery of a property by the mortgagor to the mortgagee when the property is already in the possession of the latter. This contention also must necessarily fail because the weight of judicial authority is against the contention of the appellants. Even in *Soban Lal* v. *Mohan Lal*[1], the majority of the Bench took the view that when a mortgagor sells the property to a usufructuary mortgagee by an unregistered document, the possession of the mortgagee from the date of the sale becomes adverse to the mortgagor. True it is, that in the Bombay case *Bhikhabhaai* v *Chimanlal*[2], the Full Bench stated as follows :—

"The delivery contemplated by section 54 is not constructive or symbolic delivery but actual or real delivery. Therefore, where a mortgagor sells the mortgaged property to a sub-mortgagee in possession, as the sub-mortagee is already in possession no further possession can be given to him and hence, even assuming that the equity of redemption constitutes a tangible immovable property the sub-mortgogee can acquire title to the property only if he obtains a registered instrument."

But, there are other cases including decision of our own Court, which are binding on me, which have taken a different view. *Phoku Mian* v. *Syed Ali*[3], took the view that a delivery of possession when the property is in the possession of the vendee can be made by the vendor making a declaration that henceforth whatever right he had has been transferred to the vendee and consequently, where a property in the possession of a usufructuary mortgagee was sold to him by the mortgagor and the mortgagor renounced this right and got the name of the mortgagee recorded in the record of rights, it would be sufficient compliance with the provisions of section 54 of the Transfer of Property Act. In *Venkatasubbamma* v. *Subbayya*[4], it was held that even in cases where a transaction is not evidenced by a registered document in regard to property of the value of less than Rs. 100, there should be delivery of property to make it effective, but such delivery should be construed as one which the property is capable of and, consequently, there could be delivery of property within the purview of section 54 to a usufructuary mortgagee to satisfy the requirements of section 54 if there is agreement between the parties, that after the sale, the possession of the mortgagee should be that of an absolute owner. Coming, last to the view of our own High Court, it is to be found in *Shaik Dawood* v. *Moideen Batcha*[1], which is a Bench decision and in *S. Udayar* v. *M. Padayachi*[2]. In the former case, it was held that where a usufructuary mortgagee in possession of a property purchases the property in lieu of the debt due from the mortgagor, a direction by the vendor to keep the property as absolute owner amounts to delivery. It was further held that where a usufructuary mortgagee purchases the property in lieu of the debt, actual delivery is not necessary. This was followed by Rajagopala Ayyangar, J. in *S. Udayar* v. *M. Padayachi*[2]. Having regard to these authorities, the contention of the appellants that in the absence of actual delivery of the suit property to the respondent who was already in possession of it as mortgagee, the oral sale will not satisfy the test of section 54 of the Transfer of Property Act, must fail.

13. In the result, the judgment of the learned Subordinate Judge does not call for interference. Consequently, the second appeal will stand dismissed, but there will be no order as to costs. No leave.

R.S. —— *Appeal dismissed.*

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1. A.I.R. 1928 All. 726 (F.B.)
2. A.I.R. 1953 Bom. 437 (F.B.)
3. A.I.R. 1937 Pat. 178.
4. (1963) 1 An.L.T. 274 : A.I.R. 1964 A.P. 21.

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1. 21 L.W. 327 : 87 I.C. 331 : A.I.R. 1925 Mad. 566 : 48 M.L.J. 264.
2. (1957) 1 M.L.J. 17 : (1956) M.W.N. 897; A.I.R. 1957 Mad. 209.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Ramaswami, J.*

K. A. Abdul Khader .. *Petitioner**

v.

The Deputy Director of Enforcement, Information Directorate, Madras-6. .. *Respondent.*

Foreign Exchange Regulation Act (VII of 1947), sections 23, 19-G—Adjudication Proceedings and Appeal Rules, R. 11—Seizure of currency—Service of notice by registered post—Returned unserved—Notice not served again—Rule 11 contemplates service of notice—Section 19-G mandatory.

Though no objection could be taken for sending a registered notice to the last known address of the petitioner, when it was returned unserved, the department should have taken action to serve the petitioner by affixing it on the outer door, or on a conspicuous part of the premises in which that person last resided as provided under rule 11 (*c*) (of the Adjudication Proceedings and Appeal Rules). Unless such an affixture was effected, notice could not be deemed to have been served on the petitioner and therefore there was no commencement of proceeding under section 23 of the Foreign Exchange Regutation Act. Compliance with section 19-G of the Act in mandatory, if the department wants to retain the amounts beyond the period of one year. [*Para.* 5.]

In the instant case, amounts were seized from the petitioner under the Act and a registered notice was sent to the petitioner which was returned unserved. No attempts were made by the department to serve the petitioner as per rule 11 of the Adjudication Proceedings and Appeal Rules. The petitioner raised the contention that the service of notice within one year was mandatory under section 19-G and since the department failed in this, the seized amount would have to be returned to him.

Held: Since notice as required by the rules had not been effected the extended period was not available to the department. [*Para.* 5.]

Petition under Article 226 of the Constitution of India, praying the High Court to issue a writ of *mandamus* directing the respondent to return the sum of Rs. 50,000 seized from the petitioner at Tambaram.

M.M. Abdul Razack, for Petitioner.

R. Thyagarajan, for Respondent.

The Court made the following

ORDER.—On the basis of some reliable information that the petitioner had received a payment from a local person unauthorisedly as per the instructions of a person resident outside India, his person was searched under section 19-A of the Foreign Exchange Regulation Act, 1947 while he was travelling in a bus at Tambaram on 12th May, 1973. The search resulted in the seizure of Indian currency of Rs. 50,000 and two bus tickets. It is further stated in the counter-affidavit that on interrogation, the petitioner voluntarily admitted in writing that the amount was received at Madras on the previous day from an unknown person as per the instructions of his uncle Sri Latheef of No. 9, Queen St., Penang, and he was carrying the money to his native place, Abhiramam, Ramanathapuram District, for the purchase of property for his uncle as instructed in the letter. Thereafter, the petitioner filed this writ petition praying for the issue of a writ of *mandamus* or any other appropriate writ directing the respondents herein to return the sum of Rs. 50,000 seized from him on 12th May, 1973. In the affidavit originally filed in support of the writ petition, the petitioner challenged the applicability of section 5 of the Foreign Exchange Regulation Act. He also contended that the impugned action was violative of Articles 14, 19 and 31 of the Constitution. The learned counsel for the petitioner did not press any of these contentions at the time of argument. But he has raised an additional ground in W.M.P. No. 2417 of 1975. In this, he had stated that the seizure of the documents under section 19-G was effected on 12th May, 1973, but no notice commencing the proceedings under section 23 was

*W.P. No. 3211 of 1973. *3rd November, 1975.*

served on him within a period of one year and that, therefore, the respondent could not retain the money any longer. Accordingly, he was entitled for a return of the sum of Rs. 50,000. Since this point arises in view of the subsequent events which happened after the filing of the writ petition, I have permitted the petitioner to raise this additional ground.

2. It appears that subsequent to the seizure, on 10th April, 1974 a show cause notice bearing T4/26/M/74/(SCN) for alleged violation of section 5 (1) (*a*) of the Foreign Exchange Regulation Act, 1947 was issued by the Additional Director of Enforcement, Enforcement Directorate, New Delhi, to the petitioner to his address at No. 297, Thambu Chetti Street Madras-1. This is the address which the petitioner had given in the original writ petition. This notice sent by registered post acknowledgment due was returned unserved with a note 'left' by the postal authorities. When the petitioner through his lawyer issued a notice on 16th July, 1974 for the return of the money since the period of one year had expired, the respondent replied by letter dated 20th July, 1974 addressed to the advocate for the petitioner that they had already sent a notice on 10th May, 1974 which was returned unserved with a note aforesaid and enclosed a copy of the said notice and stated that in those cicumstances, the question of return of seized currency does not arise.

3. Section 19-G confers a power on the competent authority to retain the document seized in accordance with the provisions of the Act for a period not exceeding one year and if before the expiry of the said period of one year "any proceeding' under section 23 has been commenced" until the disposal of those proceedings, including proceedings, if any, before the appellate Board and the High Court. The other part of the provision is not relevant to be quoted for the purpose of their case.

4. The question for consideration is whether any proceedings under section 23 have been commenced in this case in order to give an extended period beyond the period of one year. Section 23-D of the Act states that for the purpose of adjudicating under clause (*a*) of sub-section (1) of section 23 whether any person has committed a contravention, the Director of Enforcement shall hold an enquiry in the prescribed manner after giving that person a reasonable opportunity of being heard. Adjudication Proceedings and Appeal Rules, 1957 framed under section 27 of the Foreign Exchange Regulation Act, 1947, provides for the manner of holding the enquiry. Rule 3 of these Rules prescribes that the Director shall in the first instance, issue a notice to such person requiring him to show cause within such period as may be specified in the notice, why adjudication proceedings should not be held against him. The other rules deal with the other procedures to be followed. It is therefore clear that the proceedings for adjudication contemplated under section 19-G commences with the issue of a notice to show cause. Rule 11 of the Adjudication Proceedings and Appeal Rules deals with the service of notice and it reads as follows :—

> "11. *Service of notice* :—A notice issued under these rules shall be served on any person in the following manner, that is to say (*a*) by delivering or tendering the notice to that person or his duly authorised agent ; or (*b*) by sending the notice to him by registered post with acknowledgment due to the address of his place of residence or his last known place of residence or the place where he carries on or last carried on, business or personally works, or last worked for gain ; or (*c*) if the notice cannot be served under clause (a) or clause (b) by affixing it on the outer door or some other conspicuous part of the premises in which that person resides or is known to have last resided, or carried on business or personally works or last worked, for gain and the written report thereof should be witnessed by two persons."

5. It is contended by the learned counsel for the petitioner that unless a notice is actually served on the petitioner as required under clause (a) or (b) and in cases where such actual service could not be effected under clause (*a*) or (*b*), the service of notice is effected by affixing it as provided in clause (c), there is no service of notice and unless there is service of notice there was no commencement of the

proceedings. On the other hand, the learned counsel for the respondent contended that a mere issue of a notice by registered post to the last known place of residence is enough and actual service is not necessary. Neither of the learned counsel were able to cite any decision in support of their respective contentions. Section 27 of the General Clauses Act, 1897 (Central Act X of 1897) provides that—

"Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post....unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter could be delivered in the ordinary course of post."

This provision would be applicable to the interpretation of the Foreign Exchange Regulation Act and the provisions thereof or the Rules framed thereunder. But, I am afraid even this provision could not help the respondent. This will apply only to a case where the letter addressed to the party had not been returned unserved. It would also apply only if a different intention does not appear from the provisions of the Act or the Regulations made thereunder. It is seen from Rule 11 extracted above that clause (*a*) contemplates delivering or tendering of the notice to that person or his duly authorised agent. Clause (*b*) contemplates sending the notice to him by registered post with acknowledgment due. Clause (*c*) clearly points out that notice will have to be actually served and in cases where it cannot be served it should be done by affixture. That the presumption normally invoked by section 27 of the General Clauses Act could not be invoked in the instant case is made clear by the provisions contained in clause (*c*) which requires that wherever the notice could not be effected, it will have to be done by affixing it in the outer door or some other conspicuous part of the premises. Though no objection could be taken for sending the registered notice to the last known address of the petitioner, when it was returned unserved, the department should have taken action to serve the petitioner by affixing it in the outer door or some conspicuous part of the premises in which that person last resided as provided under rule 11 (*c*). Unless such an affixture was effected notice could not be deemed to have been served on the petitioner and therefore, there was no commencement of the proceedings under section 23. Compliance with the conditions prescribed in section 19-G is mandatory, if the department wants to retain the amounts beyond the period of one year. Since notice as required by the Rules had not been effected, the extended period is not available to the department.

6. The petition is accordingly allowed, and the *rule nisi* is made absolute. But, there will be no order as to costs.

S.J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P.S. Kailasam, J.*

P. S. Angaiya Raja a firm represented by its partner Subramania Raja .. *Petitioner**

v.

A.K.D. Alagaraja Huqdar of the Rajapalayam Chatram Charities 1st Schedule properties, Rajapalayam and others .. *Respondents.*

and

K. S. Solaimalai Raja .. *Petitioner**

v.

A.K.D. Alagaraja Huqdar of the Rajapalayam Chatram Charities, 1st Schedule properties, Rajapalayam and another .. *Respondents.*

Tamil Nadu City Tenants' Protection Act (III of 1922), section 9—Application by tenant—Delay in filing—Wrong advice by counsel—Whether sufficient cause—Limitation Act (XXXVI of 1963), section 5, applicable.

Under section 9 of the Tamil Nadu City Tenant's Protection Act an application by the tenant will have to be made within one month after the service of summons. Section 5 of the Limitation Act, 1963 pro-

* C.R.P. Nos. 1762 and 1763 of 1973. *2nd January*, 1976.

vides that any application may be admitted after the prescribed period if the appellant satisfies the Court that he had sufficient cause for not making the application within such period. The requirement, that section 5 ought to have been made applicable by or under any enactment has been omitted in the new section. After the Limitation Act of 1963 came into force, the rule is that section 5 will be applicable to all applications before the Court though the petition may be opposed on the ground that section 5 is not applicable, for the period prescribed under any particular section is in the nature of a condition precedent. Section 9 of the 1922 Act is not imposing a condition precedent or expressly excluding the operation of section 5. The provisions of section 5 apply to an application under section 9 (1) of the Tamil Nadu City Tenants' Protection Act. On merits, there can be no difficulty in excusing the delay for the learned advocate who appeared for the petitioner has filed affidavits to the effect that he had advised his clients wrongly; and the *Explanation* to section 5 of the Limitation Act, provides that the fact that the appellant was misled in computing the the prescribed period for filing the application will be sufficient cause within the meaning of section 5. [*Paras.* 4, 7 *and* 2.]

Case referred to:

Chenchuramana Reddi v. *Palepu Arunachalam*, (1935) 69 M.L.J. 283 : 42 L.W. 330 : I.L.R. 58 Mad. 794: A.I.R. 1935 Mad. 857.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Srivilliputtur, dated 13th June, 1973 and made in I.A. No. 33 of 1971 in O.P. No. 23 of 1971, I.A. No. 32 of 1971 in O.P. No. 22 of 1971 (respectively).

S. V. Jayaraman, for Petitioners.

S. Padmanabhan, *R. Nadanasabapathy* and *Govardhan*, for Respondents.

The Court made the following

ORDER.—These two revision petitions arise out of two interlocutory applications filed by the petitioners in the different suits for excusing the delay in filing the original petitions for applying under section 9 of the City Tenants' Protection Act. The summons in the suits for ejectment was served on the petitioners on 26th June, 1971 and 28th June, 1971 and the suits were posted for appearance on 7th July, 1971. According to the petitioners, they were informed by their advocate that the original petition under section 9 of the City Tenants' Protection Act had to be filed within thirty days from the date of their appearance in Court. As the section required that the petition should be filed 'within one month after service on them of summons' and not from the date of appearance in Court, there was a delay of four days and two days.

2. On the merits, there can be no difficulty in excusing the delay, for the learned advocates who appeared for the petitioners have filed affidavits to the effect that they had advised their clients wrongly, and the Explanation to section 5 of the Limitation Act provides that the fact that the applicant was misled in computing the prescribed period for filing the application will be sufficient cause within the meaning of section 5.

3. But the objection to the petition for excusing the delay was based on the ground that section 5 of the Limitation Act is not applicable, as the period of one month prescribed under section 9 (1) of the City Tenants' Protection Act is a condition precedent, thereby excluding the application of section 5 of the Limitation Act.

4. Section 9 (1) of the City Tenants' Protection Act provides that the tenant who is entitled to compensation under section 3 and against whom a suit in ejectment has been instituted may, within one month after the service on him of summons, apply to the Court for an order that the landlord shall be directed to sell the land for a price to be fixed by the Court. Under this section the application will have to be made within one month after the service on him of summons. Section 5 of the Limitation Act (XXXVI of 1963) provides that any application may be admitted after the prescribed period, if the applicant satisfies the Court that he had sufficient cause for not making the application within such period. The application under section 9

(1) of the City Tenants' Protection Act is before a civil Court and it is not disputed that section 5 of the Limitation Act would be applicable to an application under section 9 (1) of the City Tenants' Protection Act, unless section 9 (1) is construed as a condition precedent. In other words, the contention of the learned counsel for the respondents is that, as the right of the landlord is taken away, the section enabling the tenant to have resort to that provision should be strictly construed. Relying on a decision of a Full Bench of this Court relating to section 9 (1) (c) of the Provincial Insolvency Act, Mr. Padmanabhan, learned counsel for the respondents, submitted that section 9 (1) of the City Tenant's Protection Act should be construed as meaning that, unless the application under that section was filed within one month after service on him of summons, the Court would have no jurisdiction to entertain such an application. Section 9 (1) (c) of the Provincial Insolvency Act is in the following terms :

9 (1) A creditor shall not be entitled to present an insolvency petition against a debtor, unless—

(a) ....

(b) ....

(c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition.

Construing the language of this section, a Full Bench of this Court in *Chenchuramana Reddi* v. *Palepu Arunachalam*[1], held that section 9 (1) (c) of the Provincial Insolvency Act was a condition precedent to the filing of petition ; that is to say, the petitioning creditor must, on the day when he presents his petition, have in view some act of insolvency which the debtor had committed within the preceding three months; he had to see on that date, and that date only, what acts of insolvency were available to him ; and he could not make use of any act of insolvency which had been committed outside the period of three months, as that had ceased to be an act of insolvency. Holding that section 9 (1) (c) did not provide a period of limitation the Court observed that the requirements under that section were in the nature of a condition precedent. It may be noted that at the time when this decision was rendered by the Full Bench, section 5 of the Limitation Act had not been made applicable to the Provincial Insolvency Act. The section, as it then stood provided that any application to which section 5 might be made applicable by or under any enactment for the time being in force might be admitted after the period of limitation prescribed therefor, if the applicant satisfied the Court that he had sufficient cause for not making the application within such period. Therefore, according to the wording of section 5 of the Limitation Act of 1908 it applied only to applications to which it had been made applicable by or under any enactment. If section 5 had not thus been made applicable the applicant before the Court could not have the benefit of that section of the Act of 1908. But the wording of section 5 of the present Limitation Act of 1963 is different, in that it makes that provisions of section 5 applicable to all applications made before the Court. The requirement that section 5 ought to have been made applicable *by or under any enactment* has been omitted in the new section. After the Limitation Act of 1963 came into force, the rule is that section 5 will be applicable to all applications before the Court, though the petition may be opposed on the ground that section 5 of the Limitation Act is not applicable, for the period prescribed under any particular section is in the nature of a condition precedent. In this connection it may be useful to refer to section 29 of the Limitation Act, which provides that in an application under any special or local law the provisions contained in sections 4 to 24 shall apply only in so far as and to the extent to which they are not expressly excluded by such special or local law. The question therefore that would arise for consideration is whether the application of section 5 of the Limitation Act of 1963 has been expressly excluded by the special or local law, *viz.*, by the provisions of section 9 of the City Tenants' Protection Act, with which we are now concerned. On a careful reading of sec-

1. (1935) 69 M.L.J. 283 : 42 L.W. 330 : I.L.R. 58 Mad. 794: A.I.R. 1935 Mad. 857.

tion 9 (1) of the City Tenants' Protection Act, I am unable to construe the wording of section 9 as imposing a condition precedent or expressly excluding the operation of section 5 of the Limitation Act. The decision of the Full Bench in *Chenchuramana Reddi* v. *Palepu Arunachalam*[1], cannot be of much help as the wording of section 9 (1) (c) of the Provincial Insolvency Act, is different and, as the law then stood section 5 of the Limitation Act had not been made applicable.

5. The decisions of single Judges of this Court were cited at the Bar, in *Sri Venugopalaswami Devasthanam, represented by its Executive Officer* v. *Narayana Gounder, represented by V. Mylswamy, Advocate, Coimbatore*[2], arising out of an application under section 9 (1) of the City Tenant's Protection Act, it was held that section 5 of the Limitation Act would not be applicable to an application under section 9 (1) of the City Tenants' Protection Act. While observing that admittedly there was no exclusion, under the City Tenants' Protection Act, of the application of the provisions of the Limitation Act, as contemplated under section 29 (2) of the Limitation Act, the learned Judge held that section 9 (1) of the City Tenants' Protection Act prescribed a condition precedent, strict compliance of which was necessary in order to invoke the benefits flowing thereunder.

6. In a later decision in (*Mrs. Johari Bi* v. *K. Vinayagam (died) and his L. Rs*[3]) N. S. Ramaswami, J., held that section 5 of the Limitation Act was applicable to an application under section 9 (1) of the City Tenants' Protection Act. The learned Judge, after referring to the decision of the Full Bench in *Chenchuramana Reddi* v. *Palepu Arunachalam*[1], and the decision of the single Judge, in (*Sri Venugopalaswami Devasthanam, represented by its Executive Officer* v. *Narayana Gounder, represented by V. Mylswamy, Advocate, Coimbatore*[2] referred to above, expressed his opinion that he was unable to agree with the view expressed in *Sri Venugopalaswami Devasthanam, represented by its Executive Officer* v. *Narayana Gounder, represented by V. Mylswamy, Advocate, Coimbatore*[1] but found it unnecessary to refer the question to a Bench, as on the facts of the case before him, the petition could be maintained, as, because of the Amending Act XXIV of 1973, the application could be made within two months from the date of the publication of the amendment Act; and as the petition was filed within the time, it was maintainable.

7. The attention of the learned Judge, who decided *Venugopalaswai Devasthanam* v. *Narayana Gounder*[1], was not drawn to the difference in the wording of section 9 (1) (c) of the Provincial Insolvency Act and section 9 (1) of the City Tenant's Protection Act. The decision of the Full Bench was based on the wording of section 9 (1) (c) of the Provincial Insolvency Act, which excluded any application unless it was in accordance with section 9 (1) (c) of the Provincial Insolvency Act. In this view, I agree with the learned counsel for the petitioners that the provisions of section 5 of the Limitation Act of 1963 apply to an application under section 9 (1) of the City Tenants' Protection Act. Both the civil revision petitions are allowed, but, under the circumstances, there will be no order as to costs.

R.S. ——— *Revision allowed.*

1. (1935) 69 M.L.J. 283: 42 L.W. 330: I.L.R. 58 Mad. 794: A.I.R. 1935 Mad. 857.
2. C.R.P. No. 2354 of 1972.
3. C.M.A. No. 522 of 1974.

1. C.R.P. No. 2354 of 1972.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, J.*

K. Sukumaran Nair .. *Petitioner**

v.

S. Neelakantan Nair by constituted attorney P. Raman Nair .. *Respondent.*

R. Sankaran Pillai .. *Petitioner*

v.

N. K. Nagamani .. *Respondent*.

S. Parthasarathy .. *Petitioner*

v.

Alamelu Ammal .. *Respondent.*

V. Sundaram .. *Petitioner*

v.

R. Jayaraman and others .. *Respondents.*

and

K.G. Damodaran and another .. *Petitioners*

v.

C. Narayanaswami Reddi .. *Respondent.*

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960)—Notice of termination of tenancy—Unnecessary before taking action under the provisions of the Act.*

(B) *Transfer of Property Act (IV of 1882), section* 106.

A notice of determination of tenancy under section 106 of the Transfer of Property Act is not necessary for taking action under the Tamil Nadu Buildings (Lease and Rent Control) Act. The Madras Act and the Act of Parliament are mutually independent. A landlord proceeding under the Madras Act is not required to invoke any of the relevant provisions of the Transfer of Property Act to enter into the portals of the statutory authorities functioning under the Madras Act for relief. [*Para.* 8.]

Cases referred to:—

Krishnamoorthi v. *Parthasarathy*, (1949) 1 M.L.J. 412: 62 L.W. 226: A.I.R. 1949 Mad. 780; *George Oakes Ltd.* v. *The Chief Judge, Small Cause Court, Madras*, (1952) 1 M.L.J. 317; *M/s. Raval and Co.*, v. *Ramachandran*, (1966) 2 M.L.J. 68: I.L.R. (1966) 2 Mad. 437: 79 L.W. 331: A.I.R. 1967 Mad. 57; *Maunjendra Dutt* v. *P.P. Roy Choudhry*, (1967) 1 M.L.J. (S.C.) 61: (1967) 1 An.W.R. (S.C.) 61: (1967) 1 S.C.J. 503: (1967) 1 S.C.R. 475: A.I.R. 1967 S.C. 1419; *Raval and Co.*, v. *K. G. Ramachandran*, (1974) 2 S.C.R. 629: A.I.R. 1974 S.C. 818; *Abbasbhai* v. *Gulamnabi*, (1964) 5 S.C.R. 157: A.I.R. 1964 S.C. 1341; *Mangilal* v. *Sugan Chand*, (1964) 5 S.C.R. 239: A.I.R. 1964 S.C. 101; *P.J. Gupta and Company* v. *K. Venkatesan, Merchant*, (1975) 1 S.C.C. 46: A.I.R. 1974 S.C. 2331; *Nagalingam* v. *Ramaswami*, (1976) 1 M.L.J. 149: A.I.R. 1976 Mad. 149; *Kalyanasundaram* v. *Natarajan*, (1969) 2 M.L.J. 585.

Petitions under section 25 of the Tamil Nadu Act XVIII of 1960 (as amended by Act XXIII of 1973), praying the High Court to revise the order of (1) the Court of the Rent Controller Appellate Authority (Subordinate Judge), Nagercoil, dated 2nd September, 1974 and made in H.R.A.No. 24 of 1973 (H.R.C. O.P.No. 2 of 1972, on the file of the Rent Controller (D.M.C., Kuzhithurai) (in C.R.P.No. 3868 of 1974); (2) Court of the Rent Control Appellate Authority (Subordinate Judge), Tirunelveli, dated 5th December, 1974 and made in C.M.A. No. 11 of 1970 (H.R.C.O.P.No. 154 of 1972, on the file of the Rent Controller (District Munsif, Tirunelveli), (in C.R. P. No. 25 of 1975); (3) Court of the Small Causes (II Judge), (Appellate Authority), (Madras) dated 4th December, 1974 and made in H.R.A.No. 37 of 1974 (H.R.C. No. 923 of 1972 on the file of the Court of Small Causes (VII Judge), Madras) (in C.R.P.No. 414 of 1975) ; (4) Court of the Appellate Authority (Subordinate Judge), Salem, dated 26th August, 1975 and made in C.M.A. No. 36 of 1974 (R.C. O.P.No. 52 of 1973 on the file of the Rent

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*C.R.P. Nos. 3868 of 1974 and 25, 414, 2332 and 2795 of 1975. *27th February*, 1976.

Controller (1st Additional District Munsif) Salem), (in C.R.P.No. 2332 of 1975) and (5) Court of the Subordinate Judge, Kancheepuram, dated 29th April, 1975 and made in C.M.A. No. 9 of 1974 (R.C.O.P.No. 26 of 1973 Rent Controller, Kancheepuram).

P. Ramaswami, for Tenant.

S. Padmanabhan, for Landlord.

The Court delivered the following

JUDGMENT.—The only question of law that has been argued in this batch of Civil Revision Petitions is whether a notice of termination of tenancy under section 106, of the Transfer of Property Act is required before taking action under one or the other of the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The facts which are common and which are not agitated before me need not be adverted to. But the question has arisen in all these cases whether a notice of termination of tenancy under the Transfer of Property Act is required at all before a petition could be presented to the statutory authority under the Buildings Act for obtaining relief under the various provisions of the Act.

2. There is abundance of case law on this subject and at one time they were perplexing and apparently contradictory as well. I shall now trace the various decided cases to find whether in the view of the Supreme Court as laid down by them and reiterated by them later the provisions of the Transfer of Property Act still would hold the field and should be looked into for purpose of observance of some of its prescriptions before an application under the Buildings Act could be filed. I may at once state that having regard to the declared law of the Supreme Court such an invocation of the provisions of the Transfer of Property Act including that prescription in section 106 of it may not be necessary at all. The earliest ruling on the question is the decision of a Division Bench of our Court in *Krishnamoorthy* v. *Parthasarathy*[1]. There the learned Judges said that no notice determining the tenancy under section 106 of the Transfer of Property Act (hereinafter for convenience called notice) was necessary before a landlord attempts to seek some relief under the special enactment, namely, the Tamil Nadu Buildings Act. This view was approved by another Division Bench of our Court in *George Oakes Ltd.* v. *The Chief Judge, Small Cause Court, Madras*[1], but a controversy arose in 1966. In that case the subject matter was as to what ought to be the fair rent of the demised premises. But in view of the contentions of counsel therein a Full Bench was constituted and in *M/s. Raval and Co.* v. *Ramachandran*[2], the question whether a notice is required before action is taken under this Special Act, was considered alongside with the main dispute in that case which related to the fixation of fair rent. The Full Bench again approved the ratio in *Krishanamoorthy* v. *Parthasarathy*[3], and held that no such notice was necessary.

3. Whilst this was ruling the field, a decision of the Supreme Court reported in *Maunjendra Dutt* v. *P.P. Roy Chowdhry*[4], made certain observations touching upon the matter in issue before me namely, whether a notice was necessary at all before taking action under the Rent Act. That was a case which arose under the Calcutta Thika Tenancy Act, 1949. While considering the provisions of that Act in juxtaposition to the provisions of the Transfer of Property Act, the Supreme Court would not agree with the decision of our Court which held the field till 1966, the basis of which was the ruling in *R. Krishnamoorthy* v. *Parthasarathy*[3]. There is undoubtedly an observation in *Maunjendra Dutt* v. *P. P. Roy Chowdhry*[4] to the effect that the decision in *R. Krishnamoorthy* v. *Parthasarathy*[1], cannot be said

1. (1949) 1 M.L.J. 412 : 62 L.W. 226 : A.I.R. 1949 Mad. 780.

1. (1952) 1 M.L.J. 317.
2. I.L.R. (1966) 2 Mad. 437: 79 L.W. 331 : (1966) 2 M.L.J. 68 : A.I.R. 1967 Mad. 57.
3. (1949) 1 M.L.J. 412 : 62 L.W. 226: A.I.R. 1949 Mad. 780.
4. (1967) 1 An.W.R. (S.C.) 61 : (1967) 1 S.C.J. 503: (1967) 1 S.C.R. 475: (1967) 1 M.L.J. (S.C.) 61: A.I.R. 1967 S.C. 1419.

to be correctly laying down the principle in so far as the issuance of a notice under section 106 of the Transfer of Property Act is concerned. Naturally, therefore, a DivisionBench of our Court which decided cases under the Tamil Nadu Buildings (Lease and Rent Control) Act followed the above decision of the Supreme Court in *Maunjendra Dutt* v. *P.P. Roy Chowdhry*[1]. and not *Krishnamoorthy* v. *Parthasarathy*[2], and held that notice of termination of tenancy under the Transfer of Property Act was necessary before action could be taken.

4. Whilst this was the position, the decision of the Full Bench reported in *Raval and Company* v. *Ramachandran*[3], (hereinafter to be referred to as *Raval's case*[3]) came up in appeal before the Supreme Court in *Raval and Company* v. *K.G. Ramachandran*[4]. The observations of Alagiriswami, J., who spoke for the majority of the Bench are very apposite and it would be convenient to excerpt them instead of summarising.

> "*We are not called upon in this case to consider whether those two cases were correctly decided. But we must point out that the general observations therein should be confined to the facts of those cases.*"

5. The decision of the Madras High Court in *R. Krishnamoorthy* v. *Parthasarathy*[2] where it was held that section 7 of the Madras Buildings (Lease and Rent Control) Act of 1946 had its own scheme of procedure and therefore there was no question of an attempt to reconcile that Act with the Transfer of Property Act and that an application for eviction could be made to the Rent Controller even before the contractual tenancy was terminated by a notice to quit should not have been summarily dismissed on the grounds that it was contrary to the decisions of this Court in *Abbasbhai* v. *Gulamnabi*[1], and *Mangilal* v. *Sugan Chand*[2], and therefore was not a correct law, without examining the provisions of that Act.

6. Be that as it may, we are now concerned with the question of fixation of fair rent........

> "The Madras High Court reviewed all the decisions of this Court except the latest one in *Maunjendra Dutt's case*[3]. We have already pointed out that the criticism made in that decision regarding *Krishnamoorthy's case*[4], was not justified. We are in agreement with the view of the Full Bench of the Madras High Court that the various decisions of this Court were based upon particular provisions of the Acts which were under consideration mainly the Bombay Act which is vitally different from the Madras Act. A close analysis of the Madras Act shows that it has a scheme of its own and it is intended to provide a complete code in respect of both contractual tenancies as well as what are popularly called statutory tenancies."

This view of the Supreme Court is again reiterated in *P.J. Gupta and Company* v. *K. Venkatesan, Merchant*[5]. There Beg, J., speaking for the Bench said:

> "If is clear from the majority view of this Court in *M/s. Raval and Company* v. *K.G. Ramachandran*[6], dismissing an appeal from a judgment of the Full Bench of Madras High Court reported in *Raval and Company* v. *K.G. Ramachandran*[7], that the Act "has a scheme of its own and it is intended to provide a complete code in respect of both con-

1. (1967) 1 M.L.J. (S.C.) 61 : (1967) 1 AnW.R. (S.C.) 61 : (1967) 1 S.C.J. 503: (1967) 1 S.C.R. 475: A.I.R. 1967 S.C. 1419.
2. (1949) 1 M.L.J. 412: A.I.R. 1949 Mad. 780.
3. I.L.R. (1966) 2 Mad. 437 : 79 L.W. 331 : (1966) 2 M.L.J. 68.
4. (1974) 2 S.C.R. 629: A.I.R. 1974 S.C. 818.

1. (1964) 5 S.C.R. 157 : A.I.R. 1964 S.C. 1341.
2. (1964) 5 S.C.R. 239 : A.I.R. 1965 S.C. 101.
3 (1967) 1 S.C.R. 475 : (1967) 1 An.W.R. (S.C.) 61 : (1967) 1 M.L.J. (S.C.) 61 : (1967) 1 S.C.J. 503 : A.I.R. 1967 S.C. 1419.
4. (1949) 1 M.L.J. 412 : A.I.R. 1949 Mad. 780.
5. (1975) 1 S.C.C. 46: A.I.R. 1974 S.C. 2331.
6. (1974) 2 S.C.R. 629 : A.I.R. 1974 S.C. 818 at p. 823.
7. (1966) 2 M.L.J. 68 : I.L.R. (1966) 2 Mad. 437 : A.I.R. 1967 Mad. 57 (F.B.)

tractual tenancies as well as what are popularly called statutory tenancies." In other words, *the special procedure provided by the Act displaces the requirements of the procedure for eviction under the Transfer of Property Act and by an ordinary civil suit. Therefore we need not concern ourselves with the provisions of the Transfer of Property Act.*"

It is however brought to my notice that my learned brother, Gokulakrishnan, J., in *Nagalingam* v. *Ramaswami*[1], following once again the ruling of our Court has said that it was necessary for the landlord to issue the usual statutory notice of determination of tenancy under section 106 of the Transfer of Property Act. But it is unfortunate that the decisions of the Supreme Court referred to by me above were not brought to his notice.

7. The net analysis of the position appears to be this: At one time, till 1966, the law declared by our Courts were to the effect that no notice of determination of tenancy under section 106 of the Transfer of Property Act was necessary before the special statutory benefits could be availed of by the landlord under the provisions of the Buildings Act. The notion is founded on the well-known principle that "the special excludes the general". When a subjectmatter is dealt with by a local Legislature as well as by the Parliament and if the local Legislature had the legislative power to enact a law on the subject under the relative entries in the VII Schedule to the Constitution of India, then that procedure which is special in scope and application should prevail over the general principles which might govern normal situations by reason of the impact of the Central Law on the same subject. The Full Bench of our Court in *Raval's case*[2] accepts this well-known application of the maxim as above. But reference was made in a case decided by a Division Bench of this Court in *Kalyanasundaram* v. *Natarajan*[3], to a decision of the Supreme Court reported in *Maunjendra Dutt* v. *P.P. Roy Chowdhry*[4], which in turn commented upon the applicability of the rule in *Krishnamoorthy* v. *Parthasarathy*[1]. The Supreme Court in *Raval and Co.* v. *K. G. Ramachandran*[2], pointedly referred to the fact that such a summary disposal of the rule in *Krishnamoorthy* v. *Parthasarathy*[1], ought not to have been done. Alagiriswami, J.'s, observations made in *Raval and Company* v. *K.G. Ramachandran*[2], have already been excerpted by me and the underlining in the passages is mine. Sufficient and significant accent is made on the self-sufficiency of the Madras Act. It is in that light the later decisions of the Supreme Court in *Raval and Company* v. *K.G. Ramachandran*[2], and *P.J. Gupta and Company* v. *Venkatesan Merchant*[3], have to be understood. They have laid particular emphasis upon the fact that the Tamil Nadu Buildings (Lease and Rent Control) Act is an Act by itself and it operates in its own field, without any dependency upon any other enactment including the Transfer of Property Act. Such an emphatic pronouncement leads me to the conclusion that the rule in *Kalyanasundaram* v. *Natarajan*[4], is not applicable and it is only the rule in the other Division Bench case as well as in the *Revals' case*[2] ought to be the law which has been accepted to be the correct law by the Supreme Court.

8. As the Supreme Court has said that "we need not concern ourselves with the provisions of the Transfer of Property Act" when we are confronted with the application of a special enactment. It follows that a notice of determination of tenancy under section 106 of the Transfer of Property Act is not necessary and the Madras Act and the Act of Parliament are mutually independent and not dependent for a landlord proceeding under the Madras Act to invoke any of the relevant provisions of the Transfer of Property Act to enter into the portals of the statutory authorities functioning under the Madras Act for relief. In view of my above

1. (1976) 1 M.L.J. 149: A.I.R. 1976 Mad. 149.
2. (1966) 2 M.L.J. 68: I.L.R. (1966) 2 Mad. 437: A.I.R. 1967 Mad. 57 (F.B.).
3. (1969) 2 M.L.J. 585.
4. (1967) 1 S.C.J. 503 : (1967) 1 M.L.J. (S.C.) 61.

1. (1949) 1 M.L.J. 412 : A.I.R. 1949 Mad. 780.
2. (1974) 2 S.C.R. 629 : A.I.R. 1974 S.C. 818.
3. (1975) 1 S.C.C. 46 : A.I.R. 1974 S.C. 2331.
4. (1969) 2 M.L.J. 585.

decision and as notice is not necessary, no other point survives. Civil Revision Petition No. 25 of 1975 fails and it is dismissed. No costs.

9. In C.R.P.No: 2332 of 1975 notice has been given and the lower Court has rightly held that the notice is valid and that the petition for eviction was maintainable. The Civil Revision Petition is therefore dismissed. No costs. If there are no arrears of rent, the petitioner is granted three months time to vacate.

10. In C.R.P.No. 3868 of 1974; a notice of determination of tenancy was given. Its purport was questioned at some stage before the lower Court. But as in my view no such notice of termination of tenancy is required, the argument does not survive. No other question of jurisdiction arises in this petition. The Civil Revision Petition is therefore dismissed. The petitioner-tenant is given three months time from this date to vacate since he is continuing in a portion of the demised premises. No costs.

11. In C.R.P.No. 414 of 1975 the propriety of a notice of determination of tenancy was gone into. As in my view it is not necessary, the question need not be gone into again. The petitioner is the tenant. The Civil Revision Petition is dismissed as there is no other error of jurisdiction. The petitioner is granted four months time to vacate. No costs.

12. In C.R.P. No. 2795 of 1975 again the question is whether the notice of termination of tenancy was valid. But inasmuch as a notice is not necessary, no more investigation into it is called for. The petition itself was filed under section 14 (1) (*b*) of the Buildings Act. No error of jurisdiction arises. The Civil Revision Petition is dismissed. No costs.

R.S. ——— *Revision Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*V. Ramaswami, J.*

C. P. Hari Rao .. *Petitioner**

v.

The Government of Tamil Nadu represented by Secretary to Government Education Department Madras-9, and others .. *Respondents.*

and

N. Balasubramanian .. *Petitioner*

v.

The Government of Tamil Nadu represnted by Secretary to Government, Education Department, Madras-9 and others

.. *Respondents..*

Madras Ministerial Service Rules, rule 11—*Direct recruitment to service—Government Order—Rule not amended—Combined seniority list prepared—Promotion on temporary basis—Procedure adopted whether correct—Government Order whether liable to be quashed.*

Rule 11 of the Madras Ministerial Services Rules provides that for the purposes of direct recruitment to the services, a 'departmental unit' shall mean (*a*) in the city of Madras, each office, and (*b*) outside the city of Madras, each department in each district. The proviso to the rule states that each of the groups specified therein shall be a departmental unit. The Education Department is not one of the departmental units mentioned in the proviso ; but under the main part, each of the offices in the city of Madras would form a separate departmental unit and those outside the city of Madras a separate departmental unit. [*Para.* 5.]

So long as rule 11 is not amended, it could not be ignored on the ground that an amendment was in contemplation in pursuance of the policy decision of the Government. The Government Order could not affect the operation of rule 11 itself and if the impugned Government order is to be construed as an amendment to the statutory rule, that could not

*W.P.Nos. 1723 of 1974 and 1916 of 1974.
21st October, 1975.

be amended by an administrative direction or instruction. Such an administrative instruction affecting promotion without amending the relevant rules would be contrary to law. [*Para.* 8.]

Case referred to :

State of Haryana v. *Shamsher Jang*, (1973) 1 S.C.R. 249 : A.I.R. 1972 S.C. 1546.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavits filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records of the 1st respondent in both the petitions comprised in G.O. Ms. No. 716, Education, dated 6th May, 1974 and quash the paragraph 3 of the said order in so far as the petitioner is concerned in W.P. No. 1723 of 1974 and quash the said G.O. in W.P. No. 1916 of 1974.

D. Raju, for Petitioner in W.P. No. 1723 of 1974.

N.R. Chandran, for Petitioner in W.P. No. 1916 of 1974.

S. Ramalingam, Assistant Government Pleader, for Respondents 1 to 3.

K.K. Venugopal for *R. Mohan*, for Respondent 4 in W.P. No. 1723 of 1974.

The Court made the following

ORDER.—In these two writ petitions the petitioners have prayed for a writ of *certiorari* to quash G.O. Ms. No. 716, Education, dated 6th May, 1974. These petitioners were originally appointed as lower division clerks in the then office of the Director of Public Instruction, Madras. They were later promoted as Upper Division Clerk (now designated as Assistants). The next promotion for these petitioners was to the post of Superintendent. In the meanwhile the office of the Director of Public Instruction was bifurcated in 1965 as Directorate of School Education and Directorate of Collegiate Education.

2. In the Education Department, the office of the then Director of Public Instruction was treated as one unit for purposes of appointments, transfers and promotions and the subordinate offices situate outside the city of Madras were treated as a separate unit. The result of it was the appointments, promotions and transfers arising in one unit were made from among the personnel of that unit and there was no combined seniority in relation to the city office and the subordinate offices. When the office of the Director of Public Instruction was bifurcated into Directorate of School Education and Directorate of Collegiate Education in 1965, the personnel in the city and the subordinate offices were made mutually transferable from one Directorate to the other, but, later on in the year 1972, they were given election to opt either to the Directorate of School Education or to the Directorate of Collegiate Education. It is claimed by the Government in their counter-affidavit that those who did not opt were made permanent in the offices in which they were working at that time. Though this point was disputed by the learned counsel for the petitioners, that does not arise for consideration and need not detain us further.

3. By the impugned Government Order, after noting that the entire Ministerial staff of the School and Collegiate Education Departments consisting of Superintendents, Assistants and Junior Assistants are divided into two units, one for the Directorate, and the other for the subordinate offices, for purposes of recruitment, transfer and promotion and that representations had been received that the 'one unit' system might be implemented for all the Ministerial staff working in the School and Collegiate Education Departments in the State to equalise the promotional opportunities among the Ministerial staff, and that the recommendation of the Second Pay Commission was also to that effect, the Government decided that the system of treating the State as a single unit for the post in the Tamil Nadu Ministerial Service in the School and Collegiate Education Departments should be introduced forthwith. The Government accordingly, treating the entire ministerial staff of the School and Collegiate Education Departments in the State as a single unit, directed the concerned authorities to send draft amendments to the Special Rules relating to the Tamil Nadu Services Manual immediately. The petitioners contend that by this decision of the Government the promotional pros-

pects of the petitioners were very much affected and that the Government order is liable to be quashed. It was their further case that as per the seniority in the Directorate of School and Collegiate Education Departments, they stand in the first and second ranks for promotion as Superintendent and that if a combined seniority as per the direction in the impugned Government order is taken, they would be pushed down by 78 and 79 places respectively.

4. To have one unit for the entire Ministerial Staff of the School and Collegiate Education Departments in the State, or to have more than one unit, is certainly a policy decision which the Government alone is competent to take and the Courts are not entitled to interfere with such policy decision. But what is contended by the learned counsel for the petitioners is that there is a statutory rule which divides the entire Ministerial staff in the State into two units, one for Directorates in the city and the other for the subordinate offices situate outside the city of Madras for purposes of appointments, transfers and promotions and that so long as the rule has not been amended, the Government could not by an administrative direction achieve to have one unit for the entire State.

5. Rule 11 of the Madras Ministerial Services Rules provides that for purposes of direct recruitment to the service, a 'departmental unit' shall mean (a) in the city of Madras, each office; and (b) outside the city of Madras, each department in each district, that rule contains a proviso which states that each of the groups specified in that proviso shall be a departmental unit. The Education Department is not one of the departmental units mentioned in the proviso; but, under the main part, each of the offices in the city of Madras would form a separate departmental unit and those outsides the city of Madras, a separate departmental unit.

6. Mr. K.K. Venugopal, for the fourth respondent, contended that even before the issue of the impugned Government Order, the rules contemplated only one unit for the Ministerial Staff in the entire State and not two units, one for the Directorates in the city and the other for the subordinate offices. He referred to Rule 10 of the said rules and also Rule 36 (c) and Annexure II in support of his argument. Rule 10 provides that the appointing authorities for the categories and posts specified in column (1) of Annexure II shall be the authorities specified in the corresponding entry in column (2) thereof, and that all powers of first appointment, discharge, suspension or termination of probation, re-appointment, promotion, transfer and appointment as full member in respect of the said categories and posts shall be exercised by those authorities. Rule 36 (c) provides that the unit of application of the General Rules governing promotion shall be the jurisdiction of each of the authorities which according to Annexure II are competent to make promotion. In Annexure II, the relevant column (1) and column (2) read as follows :—

EDUCATION DEPARTMENT

Category and posts.	*Appointing Authority.*
(1) Superintendents, Clerks, Typists and Steno-typists in the office of the Director of Public Instruction.	Deputy Director of Public Instruction (Personnel).
(3) Managers, Head Clerks, Accountants, Librarians and Clerks whose minimum pay in the time-scale is Rs. 125 and above in the Offices and institutions except in the National Cadet Corps Units under the control of the Director of Public Instruction.	Deputy Director of Public Instruction (Personnel).

The learned counsel contended that a reading of rules 10 and 36 (*c*) with Annexure II shows that the Deputy Director of Public Instruction (Personnel) is made the authority for appointments, transfers and promotions, that rule 11 which provides for two units was only for purposes of direct recruitment and not for promotion and that therefore on a combined reading of these provisions, in so far as promotions are concerned, the rules state that the Ministerial Staff in the entire state is one unit, and not two units. I am unable to agree with this contention of the learned counsel.

7. 'Departmental Unit' is defined in rule 11 as meaning "in the city of Madras, each office; and outside the city of Madras, each department in each district." Rule 36 (*a*) provides that the unit of application of the General Rules governing recruitment shall be the departmental unit. Rule 36 (*c*) deals with promotions, and even in respect of those promotions, the unit is kept intact, and only the authority competent to make those promotion is referred to with reference to his jurisdiction irrespective of his unit. The result is that as per Annexure II, in all cases where the emoluments are more than Rs. 125, the Deputy Director of Public Instruction would be the competent authority at the relevant time to make promotions in respect of both the units. But that does not mean that the rules do not keep the units separately and independently. In making the promotions the competent authority would have to consider only the claim of persons from the concerned unit and not the claims of those in the other unit. I may also mention that the Government, in their counter-affidavit, did not take up the stand that as per the rules, in the matter of promotion, the Ministerial Staff in the entire State formed one unit. On the other hand, they tried to support the Government Order on the ground that it was only a policy decision and that they are contemplating an amendment of the relevant statutory rules. These writ petitions, therefore, will have to be considered only on the basis that the offices of directorates in the city constitute a different unit from the unit constituting the subordinate offices situate outside the city of Madras.

8. The real grievance of the petitioners is that though rule 11 of the Madras Ministerial Service Rules is a statutory rule, on the basis of the impugned Government Order a combined seniority list has been prepared and persons are being promoted, though on a temporary basis, contrary to rule 11 even before an amendment of the rule is effected pursuant to the Government decision. I think the petitioners have a justifiable cause. So long as rule 11 is not amended, neither the second nor the third respondent could ignore the same merely on the ground that they are contemplating an amendment of the rule in pursuance of the policy decision of the Government. In fact, the Government Order could not affect the operation of rule 11 itself and if the impugned Government Order is to be construed as an amendment to the statutory rule, that would be clearly illegal, as a statutory rule could not be amended by an administrative direction or instruction. That such an administrative instruction affecting promotion without amending the relevant rules would be contrary to law, is clearly laid down by the Supreme Court in *State of Haryana v. Shamsher Jang*[1]. But, as already stated, the impugned Government Order does not purport to amend rule 11 of the Rules, but only gives a direction to the concerned authorities to submit draft amendments to the rules in the light of the decision of the Government. In the absence of an amendment Rule 11 shall be deemed to be in force and the second and the third respondents should make promotions, whether temporary or otherwise, only in accordance with Rule 11 and not otherwise. The petitioners, therefore, would be entitled to be considered for promotion as if rule 11 is still in force.

9. The learned Government Pleader contended that rightly or wrongly the respondents have made temporary promotions of a number of personnel during the pendency of the writ petitions and without notice to those persons and without considering their objections, no relief could be granted to the petitioners in this case. I am unable to agree with this contention of the learned Government Pleader.

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1. (1973) 1 S.C.R. 249 : A.I.R. 1972 S.C. 1546.

These temporary promotions were made pending the writ petitions; and by those temporary promotions, the rights of the writ petitioners could not be affected. Since the temporary promotions were made pending the writ petitions, even those persons who were promoted as Superintendents have no claim to be heard in these proceedings.

10. In the result, though the Government Order is not liable to be quashed, the petitioners are entitled to be considered for promotion on merits on the basis that rule 11 of the Madras Ministerial Service Rules is still in force and the offices of the Directorates in the city of Madras is a separate unit. There will be a direction in these writ petitions accordingly. But, it is made clear that I am not deciding the question as to whether an amendment of rule 11 with retrospective effect is possible or legal. That questions will have to be considered as and when it is raised in a properly instituted proceeding. There will be no order as to costs.

R.S. — *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*G. Ramanujam, J.*

R. Abdul Wahab .. *Petitioner**

v.

Union of India represented by its Secretary, Ministry of Finance, New Delhi and others .. *Respondents.*

Central Civil Services (Classification, Control and Appeal) Rules, 1957, *rule* 30—*Petitioner a clerk in Central Excise Department in* 1943—*Promoted as Sub-Inspector in* 1945 *and on upgrading served as Inspector—Disciplinary proceedings against him—Compulsorily retired from service—Appeal—Dismissal of appeal by non-speaking order — Order liable to be set aside.*

One of the attributes of a quasi-judicial order is that it must be a reasoned order upon a finding on the facts in controversy and application of law to the facts found. Recording of reasons in support of a decision by a quasi-judicial authority is obligatory as it ensures that the decision is reached according to law and is not a result of caprice, whim or fancy or reached or ground of policy or expediency. The necessity to record reasons is greater if the order is subject to appeal or revision to a higher authority. [*Para.* 6.]

The second respondent, the appellate authority in the instant case merely passed a laconic order stating that charge III of the charges against the writ petitioner was proved and the penalty of compulsory retirement from service can be justified on that charge alone. Since the second respondent had not passed a speaking order it cannot be found what were the matters which weighed with the second respondent in holding charge III as proved and secondly for justifying the order of compulsory retirement. Rule 30 of the Central Civil Services (Classification, Control and Appeal) Rules enjoins a duty on the part of the second respondent to consider the findings of the initial authority and whether the punishment imposed was justified on the materials. The laconic order passed by the second respondent does not indicate the consideration which the second respondent gave in relation to those matters. Admittedly, the order passed by the second respondent is subject to review under Rule 29 (3). Unless the second respondent passes a reasoned order or a speaking order, it is not possible for the reviewing authority, the Central Government, to exercise its review power under the said provision. The order of the second respondent is therefore liable to be set aside. [*Para.* 10.]

Cases referred to:—

Travancore Rayons v. *Union of India,* (1970) 3 S.C.R. 40: (1971) 2 S.C.J. 372: A.I.R. 1971 S.C. 862; *Mahabir Prasad* v. *State of Uttar Pradesh,* (1971) 1 S.C.J. 256: (1971) 1 S.C.R. 201: A.I.R. 1970 S.C. 1302; *C.L. Subramaniam* v. *Collector of Customs, Cochin,* (1972) 3 S.C.R. 485: (1973) 2 S.C.J. 488: A.I.R. 1972 S.C. 2178.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit

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*W.P. No. 1803 of 1971. *29th September,* 1975.

filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to file in C.No. 11/10.A./27/58 B.6. dated 13th May, 1960 relating to the establishment and on appeal on the file of the Central Board of Excise and Customs, New Delhi in their file No. 2/146/60 Ad. V. dated 23rd May, 1962 and other connected records regarding the same and quash the same on petition to the Government of India in file No. 2/1/68 Ad.v. dated 26th October, 1968 as being illegal and without jurisdiction.

K.P. Jagadeesan, for Petitioner.

V. Alagiriswami, Junior Central Government Standing Counsel, for Respondents.

The Court made the following

ORDER:—The petitioner joined the Department of Salt and Customs in the year 1937 as a clerk and was later transferred to the Central Excise Department in 1945. He was then promoted as a Sub-Inspector of Central Excise in the year 1945. Later, the same post was upgraded to the post of Inspector and the petitioner served as Inspector of Central Excise till 13th May, 1960 when he was compulsorily retired from service as a result of certain disciplinary proceedings initiated against him. The petitioner filed an appeal against the order of compulsory retirement dated 13th May, 1960 passed by the Collector of Central Excise, the third respondent herein, to the Central Board of Excise and Customs, New Delhi, the second respondent herein. Since the said appeal had been dismissed, the petitioner approached this Court seeking a writ of *certiorari* to quash the said appellate order dated 23rd May, 1962 confirming the order of the third respondent compulsorily retiring him from service. The petitioner has attacked the validity of the appellate order of the second Respondent on various grounds. Before dealing with the various grounds of attack it is necessry to set out briefly the charges framed against the petitioner and his defence.

2. When the petitioner was the Inspector of Central Excise at Sivakasi, the following four charges have been framed against him, relating to certain commissions and omissions:

"*Charge I*:—Shri R.Abdul Wahab, while functioning as Inspector of Central Excise at Sivakasi during the period from 23rd April, 1955 onwards misused his official position and connived with the licensees by introducing an illegal practice—

(*a*) of facilitating clearances in respect of credit-banderolled matches without payment of duty in contravention of rules 9 (1), 81 and 82 of the Central Excise Rules, 1944:

(*b*) of admitting clearance applications (A.R.Is.) without factual removals in contravention of rule 81 of the Central Excise Rules, 1944, and thereby endangered the Government Revenue.

Charge II:—During the aforesaid period and while functioning in the aforesaid office, the said Shri R. Abdul Wahab committed breach of trust placed in him by the Government under rule 75 of the Central Excises Rules, 1944.

Charge III:—During the aforesaid period and while functioning in the aforesaid office, the said Shri R. Abdul Wahab, exhibited gross negligence in the discharge of his official duties:—

(*a*) in not complying with the provisions of rule 81 of the Central Excise Rules, 1944:

(*b*) in not complying with the instructions contained in para. 57 (*c*) of the Manual of Departmental Instructions on matches.

Charge IV:—During the aforesaid period and while functioning in the aforesaid office, the said Shri Abdul Wahab connived with the licensees in the illicit removal of credit-banderolled matches from the factories in contravention of rules 9 (1) 81 and 82 of the Central Excise Rules, 1944 and failed to exercise proper check and control over the administration of the factories under his charge in discharge of the instructions contained, in Collector's C.I./15/55/56-A.I., dated 9th October, 1956 and thereby endangered Government Revenue."

12 other officers were also charge-sheeted for similar charges. The third respondent herein, by an order dated 14th November, 1958, ordered a joint enquiry to be conducted by the then Assistant Collector (Vigilance) with respect to all the thirteen officers. The Enquiry Officer, after the completion of the enquiry submitted his findings to the third respondent on 18th February, 1959. The third respondent, by his order dated 13th May, 1960, after issuing the necessary show cause notice, found all the four charges proved and imposed the punishment of compulsory retirement on the petitioner.

3. The petitioner appealed against the said order dated 13th May, 1960 of the third respondent compulsorily retiring him from service to the second respondent herein. In the said appeal, the petitioner had raised, *inter alia*, the following contentions, (1) that the joint enquiry ordered by the third respondent in respect of the charges levelled against all the 13 officers has resulted in considerable prejudice to him and therefore, the final order passed as a result of such a joint enquiry stood vitiated, (2) that the Enquiry Officer did not give him a reasonable opportunity to cross-examine the jurisdictional Assistant Collector to prove that all the officers have followed a similar procedure as the one the petitioner has followed in the matter of inspection of the stocks of the various factories and (3) that there was a change in the procedure after 1st January, 1958 and therefore, the petitioner cannot be found fault for not following the procedure which was prevalent before 1st January, 1958. The second respondent as an appellate authority, passed an order dated 23rd May, 1962 holding

> "that while admissible evidence on record is not sufficient to establish conclusively the charges I, II and IV, nevertheless charge III has been properly established against the appellant. The appellant has thus proved to be grossly negligent in the discharge of his official duties. Having regard to the gravity of charge III the Board consider that the penalty of compulsory retirement from service imposed on the appellant is justified on this ground alone."

The petitioner thereafter filed a revision petition to the Government of India, the first respondent. That was, however, dismissed on 26th October, 1968.

4. In this writ petition, the learned Counsel for the petitioner contends (1) that the order of the second respondent is vitiated in that it is not a speaking order; (2) that in any event, the materials on record do not establish charge III, levelled against the petitioner; (3) that the first part of charge III relates to the duties set out in rule 81 of the Central Excise Rules which are normally expected to be done by a departmental sepoy who is having a watch at the gate of the factory and that it is not the function of the petitioner to verify clearances at the gate; and (4) that as regards the second limb of charge III though the petitioner had not complied with the instructions contained in paragraph 57 (*c*) of the Departmental Manual, he has in fact followed the procedure contemplated by the Central Excise Rules and endorsed the results of the check on the R.G. III, register instead of doing it in E.B. IV register as per the instructions which were followed prior to 1st January, 1958.

5. As regards the first contention, the learned counsel for the petitioner points out that though the second respondent has merely stated that charge III had properly been established against the petitioner, it does not appear that the petitioner's defence in respect of this charge have been duly considered, that the second respondent, acting as an appellate authority should have duly considered the evidence and documents *pro* and *con* and then come to a conclusion based on the said evidence and documents, and that it is not clear on what materials the second respondent held charge III proved. Reference is made to rule 30 of the Central Civil Services (Classification, Control and Appeal) Rules, 1957, which imposes a duty on the appellate authority to consider various matters. One of the matters to be considered by the appellate authority under that rule is as to whether the findings given by the initial authority are justified on the materials on record. It is said that since the order of the second respondent merely states that charge III has been properly esta-

blished against the appellant without referring to any material for or against the petitioner it is not a due compliance with the said rule 30.

6. The learned counsel for the petitioner refers to a decision of the Supreme Court in *Travancore Rayons* v. *Union of India*[1], and of this Court in W.P.No. 4727 of 1973 in support of his stand that such a laconic and non-speaking order as the one passed by the second respondent herein cannot legally be sustained.

In *Mahabir Prasad* v. *State of Utter Pradesh*[2], the Supreme Court has clearly set out the attributes of a quasi judicial order. One of the attributes of a quasi judicial order is that it must be a reasoned order upon a finding on the facts in controversy and application of law to the facts found. Recording of reasons in support of a decision by a quasi judicial authority is obligatory as it ensures that the decision is reached according to a law and is not a result of caprice, whim or fancy or reached on ground of policy or expediency. The necessity to record reasons is greater if the order is subject to appeal or revision to a higher authority or a Court. The Supreme Court had pointed out in that case:

> "The practice of the executive authority dismissing statutory appeals against orders which *prima facie* seriously prejudice the rights of the aggrieved party without giving reasons is a negation of the rule of law. This Court had occasion to protest against this practice is several decisions."

In *Travancore Rayons* v. *Union of India*[1] the Supreme Court was dealing with a revisional order passed by the Central Government, under section 36 of the Central Excise and Salt Act. The order passed by the Central Government read:

> "Government of India have carefully considered the points made by the applicant(s) but see no justification for interfering with the order in appeal. The revision application is accordingly rejected."

This order was attacked by the aggrieved party before the Supreme Court on the ground that it is not a speaking order. The Supreme Court upheld that attack and set aside the said order passed by the Central Government with a direction to dispose of the matter afresh. The Supreme Court was of the view that as orders involving important disputes are brought before the Government, it is incumbent upon the Government to pass a reasoned order reasonably disclosing that the matter received its due consideration. The following observations of the Supreme Court are pertinent in this connection:

> "Necessity to give sufficient reasons which disclose proper appreciation of the problem to be solved, and the mental process by which the conclusion is reached in cases where a non-judicial authority exercises judicial functions is obvious. When judicial power is exercised by an authority normally performing executive or administrative functions this Court would require to be satisfied that the decision has been reached after due consideration of the merits of the dispute, uninfluenced by extraneous considerations or policy or expediency. The Court insists upon disclosure of reasons in support of the order on two grounds: One, that the party aggrieved in a proceeding before the High Court or this Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, that the obligation to record reasons, operates as a deterrent against possible arbitrary action by the authority invested with the judicial power".

7. In a recent decision of this Court in W.P.No. 4727 of 1973, also arising out of an order of the appellate authority in a disciplinary proceeding, it has been expressed:

> "Under the statutory rules, the second respondent as an appellate authority has to go into the correctness of the findings given by the initial authority, the first respondent and also to consider-

1. (1970) 3 S.C.R. 40 : (1971) 2 S.C.J. 372: A.I.R. 1971 S.C. 862.

2. (1971) 1 S.C.J. 256 : (1971) 1 S.C.R. 201 : A.I.R. 1970 S.C. 1302.

the quantum of the punishment. An appellate authority is normally expected to deal with the facts relating to the charges and to give out whether the findings given by the initial authority are justified, whether on the charges proved the punishment moved out was proper and whether the procedure followed by the initial authority in the conduct of the enquiry is in accordance with the rules.

"Normally, when quasi-judicial power is exercised by an authority performing the executive or administrative functions, one expects the authority to disclose reasons in support of the order to enable the higher authority to find out whether the initial authority has properly exercised his mind. The obligation to record reasons will also operate as a deterrent againt possible arbitrary action by the executive authority invested with the quasi judicial power. In my view, the order of the second respondent in this case is vitiated for the reason that it is not a speaking order".

8. The second respondent who is the appellate authority in this case is obliged under rule 30 to consider whether the findings given by the initial authority are justified, whether the punishment meted out was proper and whether the procedure followed by the initial authority in the conduct of the enquiry was in accordance with law. The petitioner has specifically alleged in the grounds of appeal that the joint enquiry directed by the third respondent has caused him considerable prejudice and that he was not given an opportunity to cross-examine the jurisdictional Assistant Collector at Sivakasi with regard to the procedure normally followed in the checking and inspection of the factories and stores. He has also pointed out that there was a change in procedure after 1st January, 1958 and that whatever he did in the course of inspection of the stocks was consistent with the procedure which was in force after 1st January, 1958. The second respondent, before finding the petitioner guilty of charge III should have dealt with the said points urged by the petitioners.

9. Further, the second respondent has itself held that charges I, II and IV have not been proved, but had however, sustained the punishment of compulsory retirement imposed by the initial authority. The charges which were held to be not proved appear to be somewhat serious and that charge III relates merely to procedural irregularities. The initial authority imposed the punishment of compulsory retirement in view of its finding that all the charges have been proved. When the second respondent held that charge III alone had been established against the petitioner, it, however, sustained the same punishment on the ground that charge III is a grave one. It is pertinent in this context to note the averments in paragraph 8 of the counter-affidvait. It has been stated there that if the petitioner had adopted a different method to arrive at the stock, it shows that he has applied an unapproved method which was a mistake committed by him. If really what the petitioner has done is only a mistake, then it may not call for such a serious punishment as compulsory retirement. The scope and nature of the charges have to be duly considered by the second respondent before sustaining the same punishment which was given in respect of four charges by the initial authority.

10. In this case, the second respondent, the appellate authority, has merely passed a laconic order stating that charge III is held to be proved and that the penalty of compulsory retirement from service can be justified on that charge alone. Since the second respondent has not passed a speaking order, one is not able to find as to what are the matters which weighed with the second respondent firstly in holding charge III as proved and secondly for justifying the order of compulsory retirement on the basis of charge III alone. As already stated, rule 30 enjoins a duty on the part of the second respondent to consider the findings of the initial authority and whether the punishment imposed was justified on the materials. The laconic order passed by the second respondent does not indicate as to the consideration the second respondent gave in relation to those matters. Admittedly the order passed by the second respondent is subject to review under rule 29 (3). Unless the second respondent passes a

reasoned order or a speaking order, it is not possible for the reviewing authority, the Central Government to exercise its review power under the said provision. The order of the second respondent has, therefore, to be set aside on the ground that it is not a speaking order.

The learned counsel for the petitioner would, however, submit that having regard to the long lapse of time since the date of commencement of the disciplinary proceedings in 1958, the matter need not be remanded to the second respondent for dealing with the matter afresh and that the matter could be finally disposed of by this Court. The learned counsel for the petitioner invites this Court to go into the materials and find out whether Charge III is proved or not, and if it is found that Charge III is not supported by the materials on record, to set aside the order compulsorily retiring the petitioner from service straightaway. The learned counsel refers to a decision in *C.L. Subramaniam* v. *Collector of Customs, Cochin*[1], and the decision of this Court in W.P.No. 2482 of 1971 in support of his stand that this Court is entitled in suitable cases, to dispose of the matter without remitting it back for disposal afresh and to straightaway set aside the order impugned. There cannot be any controversy as to the power of this Court to grant relief to an aggrieved party if the circumstances of the case warrant the same without remitting the matter once again to the authorities concerned. But the nature of the order to be passed by this Court should in every case depend on the facts of each case. I am of the view that in this case, having regard to the fact that the matter involves the consideration of the correct procedure that should have been followed by the petitioner in the matter of inspection of the Factories and check of Stores with reference to the technical rules, it is but proper that the second respondent who is normally conversant with those technical rules and procedures should be directed to dispose of the petitioner's appeal afresh in the light of the various contentions put forward by the petitioner. I, therefore, allow the writ petition and set aside the order dated 23rd May, 1962 passed by the second respondent with a direction to dispose of the petitioner's appeal afresh after duly considering the various contentions raised by him in his grounds of appeal. Having regard to the long lapse of time that has elapsed from the year 1958 when the disciplinary proceedings started and also the fact that the petitioner has been agitating the matter since then, the second respondent is directed to dispose of the appeal within two months from the date of receipt of this order.

R.S. —— *Order accordingly.*

1. (1972) 3 S.C.R. 485 : (1973) 2 S.C.J. 488 : A.I.R. 1972 S.C. 2178.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*V. Ramaswami, J.*

S. Kuppuswamy and another .. *Petitioners**

v.

The General Manager, Heavy Vehicles Factory, Avadi, Madras-600054 and another. .. *Respondents.*

Constitution of India (1950), *Article* 310—*Services under the Union of India—Persons holding posts under Defence Service—Whether come under the category of Civil Services of the Union or civil posts under the Union—General principles of Central Service not applicable to persons under Defence Service.*

The Constitution recognises various services under the Union of India under Article 310. The Defence Services, Civil Servants of the Union, All India Service, persons holding posts connected with defence and civil posts under the Union are the various categories referred to therein. The Defence Service and persons holding any posts connected with defence are therefore not included in the category of civil services of the Union or civil posts under the Union. They are two diffierent categories. When the general principles were prescribed for the determination of seniority in the Central Services, it could not *proprio vigori* apply

*W.P. Nos. 1943 and 1944 of 1974. 23*rd October*, 1975.

to either the Defence Services or persons holding any post connected with the defence. If these principles were to be made applicable it should be only by a special instruction made as in Army Instruction No. 241 of 1950.

In view of the Office memorandum dated 22nd December, 1959 of the Home Ministry of the Government of India, the Ministry of Defence issued memoranda dated 11th March, 1965 and 22nd May, 1972. A request to the ministries to consider modifications of existing instructions on the basis of the general principles for determining seniority in central Services prescribed in the memorandum dated 22nd December, 1959 does not abrogate Army Instruction No. 241 of 1950 and cannot have that effect as civilians are governed by a separate set of rules. [*Para.* 5.]

It is true that some of the rules applicable to the Central Government civil Services and civil posts were made applicable to civilians in Defence Services but by merely applying the rules one could not equate the persons connected with defences as persons in civil Service or civil posts under the Union within the meaning of Article 310 of the Constitution. Only by modifying the existing rules, the rules governing civilians in Defence Service could be changed. [*Para.* 5.]

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to issue of a writ of *mandamus* directing the respondents to fix the seniority in respect of lower division clerks working in the Heavy Vehicles Factory, Avadi, on the basis of the date of entry into service in the said factory in so far as the petitioner is concerned and quash the order and made therein.

N. R. Chandran, for Petitioners.

S.M. Ali Mohamed, Central Government Junior Standing Counsel, for Respondents.

The Court made the following

ORDER:—These are two writ petitions for the issue of a writ of *mandamus* directing the respondents to fix the seniority of the petitioners in respect of lower division clerks working in the Heavy Vehicles Factory, Avadi on the basis of the date of entry into service in the said factory in so far as the petitioners are concerned. The petitioner in Writ Petition No. 1943 of 1974 joined the Heavy Vehicles Factory, Avadi as lower division clerk on the 5th of February, 1964 and the petitioner in Writ Petition No. 1944 of 1974 joined as such lower division clerk on 4th December, 1963. Though this is also an Ordnance Factory, this does not come under the Director-General of Ordnance Factory, Calcutta, but is directly managed as an independent unit by the General Manager under the control of the Ministry of Defence.

2. Promotion to the post of upper division clerk in this unit was to be made purely on the basis of seniority and the post of upper division clerk is a non-selection post. In December, 1970, the respondents prepared a seniority list on the basis of Army Instructions No. 241 of 1950. The petitioners contend that the fixation of seniority on the basis of Army Instructions No. 241 of 1950 was illegal and it should be done only on the basis of entry into service in the Heavy Vehicles Factory at Avadi. The learned counsel for the petitioners further contended that Army Instructions No. 241 of 1950 which were relied on by the respondents in the counter-affidavit have been superseded by office Memorandum dated 22nd December, 1959 of the Government of India in the Ministry of Home Affairs and that since the petitioners joined the service in 1963 and 1964 their seniority will have to be fixed in accordance with the principles mentioned in that Office Memorandum and not Army Instructions No. 241 of 1950. In order to understand the contention of the petitioner, it is necessary to refer to certain memorandums and instructions issued in this regard by the Ministry of Home Affairs and the Ministry of Defence.

3. The migration of a large number of Government employees after the partition of the country from areas now forming part of Pakistan created a situation which called for a review of the rules relating to the fixation of seniority. Instructions were issued by the Ministry of Home Affairs in order to safeguard the interests.

of displaced Government servants appointed to the Central Services after partition. In these instructions, the various departments were instructed to give credit for previous service of those Government servants in fixing their seniority. As it was found not possible to regulate the seniority of only the displaced Government servants by giving them credit for previous service, instructions were subsequently issued making these rules applicable to all categories of persons appointed to the Central Services. Those instructions were contained in the Office Memorandum No. 0240/63 62/D-12 dated 1st September, 1949 of the Ministry of Defence. These instructions read as follows:

"The question of seniority of Assistants in the Secretariat was recently examined very carefully in consultation with all the Ministries and the Federal Public Service Commission and the decisions reached are incorporated in para. 8 of the 'Instructions for the initial Constitution of the grade of the Assistants' an extract of which is enclosed. It has been decided that this rule should generally be taken as the model in framing the rules of seniority for other services and in respect of persons employed in any particular grade seniority should as a general rule, be determined on the basis of the length of service in that grade as well as services in an equivalent grade irrespective of whether the latter was under the control of Provincial Government in India or Pakistan. It has been found difficult to work on the basis of 'comparable' posts or grades and it has therefore been decided that 'service in equivalent grade' should, generally be defined as service on a rate of pay higher than the minimum of the time-scale of the grade concerned. The seniority of persons appointed on permanent or quasi permanent basis, before the 1st January 1944, should, however, not be disturbed."

Instructions for the initial constitution of Assistants grade of the Central Secretariat Service. 3. *Seniority of Assistants in Grade IV as newly constituted*

"The names of all existing permanent Assistants who are included in the permanent strength of the service and who were confirmed in their posts prior to the 22nd October, 1943 will be arranged in the first instance Ministrywise in accordance with rules in force at present. Such permanent Assistants will be considered senior to all others confirmed in pursuance of these instructions in vacancies arising upto the 22nd October, 1950. The order of seniority of the latter group of Assistants, namely, those confirmed after the 22nd October, 1943 which will be arranged in a single list for all Ministries, will be determined *inter se* on the basis of their length of continuous service temporary or permanent in the grade of Assistants or equivalent grade provided at any period of service during which the pay actually drawn exceeds Rs. 160 per mensem should be deemed to be service in a grade equivalent to that of an Assistant."

In accordance with the order, Army Instructions No. 241 of 1950 were issued relating to the determinatiom of seniority of persons employed in the grades mentioned therein. These instructions are as follows:

"241. *Seniority of Civilian employees in lower formations.*—In accordance with the orders contained in para. 2 of Ministry of Defence O.M. No. 0240/63 62/D-12 dated 1st September, 1949, published as Annexure 'A' to this Instruction, seniority of persons employed in a particular grade is to be determined as indicated below:

(*i*) Persons who were appointed on a permanent or a quasi-permanent basis in the grade concerned prior to the 1st January, 1944 according to the date of such appointment followed by,

(*ii*) Persons who were appointed on a permanent or a quasi-permanent basis in the grade concerned on or after 1st January, 1944 and persons temporarily employed in that grade arranged in the order of their continuous length of service in that grade or in equivalent grade, the latter as defined in para. 2 of Ministry of Defence O.M. No. 0240/636 2/D-12, dated 1st September, 1949 (Annexure 'A').

(2) Seniority of ex-servicemen employed in lower formations of the Army and ex-Burma Government servants who are included in the post 1943 block is to be regulated in accordance with Ministry of Defence O.M. No. 4604/D-12 dated 20th February, 1950 (Reproduced in Annexure 'B' to this Instruction) and A.I. No. 72 of 1950 respectively.

(3) War service candidates and temporary employees confirmed in vacancies reserved for them during the war will be dealt with as indicated below :

(a) Their seniority will first be determined in accordance with the provisions of Ministry of Home Affairs O.M. No. 30/4/46 Ests. (R) dated 18th September, 1947, reproduced in A.I. No. 380 of 1949.

(b) Persons who are entitled to count seniority from a date earlier than 1st January, 1944 under A.I. No. 380 of 1949 shall be included in category (1) referred to in para. (1) above in the following order:—

(i) Persons who were confirmed in the grade concerned during the particular year arranged according to date of confirmation ; followed by

(ii) temporary employees appointed to the posts reserved for them, who are allotted to that year arranged according to age; followed by

(iii) war service candidates appointed to permanent posts reserved for them who are allotted to that year arranged according to age.

(c) Persons who are entitled to count seniority from a date later than 31st December, 1943 shall be included in category (ii) referred to in para. (i) above and their seniority in the grade in which they are confirmed against vacancies reserved for them, shall be determined in accordance with the dates fixed under para. 1 (ii) above or the dates on which they were appointed or deemed to have been appointed to the grade concerned for the purposes of fixation of pay under A.I. No. 380 of 1949, whichever is earlier.

(4) All officers under the control of Ministry of Defence are required to prepare revised seniority lists of civilians employed in various grades in accordance with the above instructions; Dates of seniority fixed with reference to special consideration to the individual case, *e.g.*, under next below rule will remain unaltered. "

The principles contained in the memorandum dated 1st September, 1949 were extended later on in relation to the ex-Government servants of Burma appointed to Central Services and the employees of former Part B States taken over to the Centre as a result of Federal Financial Integration. By a further memorandum dated 31st March, 1950 as amended by memorandum dated 20th September, 1952, the seniority of candidates with War Service appointed to the Central Service was also regulated.

4. The position was reviewed by the Government of India sometime in 1958 and 1959. It was felt that as the specific objects underlying the instructions had been achieved there was no longer any reason to apply those instructions in preference to the normal principles for determining the seniority and therefore it was decided that thereafter the seniority of all persons appointed to the various Central Services should be determined in accordance with the general principles. Accordingly, Office memorandum dated 22nd December, 1959 issued by the Government of India, Ministry of Home Affairs, after citing the various Office memorandums referred to earlier, cancelled those instructions except in regard to the determination of seniority of persons appointed to the various Central Services prior to 22nd December, 1959. Army Instruction No. 241 of 1950 was not one of those memorandums which was cancelled in this memorandum dated 22nd December, 1959. The relevant portion of the general principles for determination of seniority in the Central Services prescribed by this memorandum dated 22nd December, 1959 reads as follows :—

" (1) These principles shall apply to the determination of seniority in Central Civil Services and Civil Posts except such services and posts for which separate principles have already been issued or may be issued hereafter by Government.

Ministries or Departments which have made separate rules or issued instructions on the basis of instructions contained in the Ministry of Home Affairs O.M. No. 30/44/48-Apptts., dated the 22nd June, 1949, are requested to consider modification of those rules or instructions on the basis of these general principles. However, whenever it is considered necessary to follow principles different from those laid down in this memorandum, a specific reference should be made to the Ministry of Home Affairs who will consult the U.P.S.C. As regards individual cases, the Ministry of Home Affairs will decided the cases on which the advice of the Commission should be obtained."

5. It is seen from these, that these principles were intended to apply only for the determination of seniority in Central Civil Services and Civil Posts and not for civilians in Defence Services. But as in the original instructions of 1st September, 1949, the various Ministries were requested to consider the modification of existing rules in their Ministries regarding the determination of seniority in accordance with this office memorandum of 22nd December, 1959, so far as persons employed in Class I and Class II posts in Defence in their memorandum No. 10 (1)/60/D (Appts) dated 11th March, 1965 it issued instructions that the seniority of all persons after 11th March, 1965 to Class I and Class II posts in the lower formations in the Ministry of Defence would have to be determined in accordance with the general principles annexed to that memorandum. Suffice it to say that these instructions require the seniority to be fixed with reference to the date of confirmation of probation and not as contained in Army Instructions No. 241 of 1950. By another memorandum dated 22nd of May, 1972, these principles applicable to Class I and Class II were made applicable to the civilians in Class III and IV of the Ordnance Factories Organisation and paid from the Defence Service Estimates as and from that date. Thus persons appointed subsequent to 22nd May, 1972, civilians Class III and IV of Ordnance Factories would take their confirmation and not as contained in Army Instructions No. 241 of 1950. But what the learned counsel for the petitioners contended is that even as and from 22nd December, 1959 Army Instructions No. 241 of 1950 became ineffective and the seniority would have to be determined only with reference to the date of confirmation in regard to persons who joined service subsequent to that date. The learned counsel contended in this regard that these instructions dated 22nd December, 1959 would be applicable to every one of the Ministries including the Ministry of Defence and if, in any particular department of that Ministry, they wanted to have a different principle from that prescribed therein they will have to specially lay down those rules after consulting the Union Public Service Commission and so long as they do not make any special provisions like that, the general principles for determination of seniority in the Central Services prescribed in that memorandum would be applicable. I am unable to agree with this contention of the learned counsel. The Constitution recognises various services under the Union of India under Article 310. The Defence Services, Civil Servants of the Union, All India Service persons holding posts connected with defence and civil posts under the Union are the various categories referred to therein. The Defence Service and persons holding any posts connected with the defence are therefore not included in the category of civil services of the Union or civil posts under the Union. They are two different categories. Therefore when these general principles were prescribed for the determination of seniority in the Central Service, it could not *proprio vigore* apply to either the Defence Services or to persons holding any post connected with the defence. If these principles were to be made applicable it should be only by a special instruction that will have to be made as in Army Instructions No. 241 of 1950. It is in view of this position that the Ministry of Defence issued the memorandum dated 11th March, 1965 and 22nd May, 1972 above referred to. Request made to the Ministries and departments to consider modification of the existing instructions on the basis of the general principles for determination of seniority in the Central Services prescribed in the memorandum dated 22nd December, 1959 does not in

any way abrogate Army Instructions No. 241 of 1950 and could not have also that effect as the civilians in Defence Services are governed by separate rules. It is true that some of the rules applicable to the Central Civil Services and Civil Posts were made applicable to civilians in Defence Services but by merely applying the rules we could not equate the persons connected with defence as persons in civil Services or civil posts under the Union within the meaning of Article 310 of the Constitution. Only by modifying the existing rules as requested in this memorandum, the rules that were governing the civilians in defence service could be modified. As already stated that was done so far as Class III and Class IV of the Ordnance Factories Organisation only from 22nd May, 1972. Therefore the petitioners could not ask for the fixation of the seniority without reference to Army Instructions No. 241 of 1950.

6. In the result these writ petitions fail and are dismissed. The rule *nisi* in each case is discharged, but there will be no order as to costs.

R.S. —— *Writ petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Veeraswami, CJ. and S. Suryamurthy, J.*

U. Abdul Jabbar and another .. *Appellants**

v.

Messrs. Manonmani Pictures by Partner K.R.E. Pattilinga Nataraja Gounder, 192, Kumaran Road, Tiruppur-1, Palladam Taluk and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 49 (2)—*Applies only to an existing partnership—Section* 2 (11)—*Meaning of "legal representative".*

Rule 49 of Order 21, Civil Procedure Code applies only to an existing partnership and not to a dissolved one. Sub-rule (2) of the rule speaks of an application of the holder of a decree against a partner and the Court making an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree. That can have reference only to an existing partnership. It is even more clear by reference to sub-rule (3) which gives liberty to the other partner or partners to redeem the interest charged, or in the case of sale being directed, to purchase the same. Where at the time execution is sought the firm is dissolved and no longer in existence, the provisions of the Partnership Act for winding up its business in the way mentioned therein will apply. Order 21, rule 49 (2) will have no application. [*Para.* 4.]

It may be that the expression "legal representative" includes any person who intermeddles with the estate of the deceased partner. The intermeddling must involve the assumption of a representative capacity in relation to an estate and not in assertion of a claim of right adversely to the estate of the deceased. [*Para.* 3.]

Cases referred to:

Chockalingam Chettiar v. *Karuppan Chettiar*, (1948) 1 M.L.J. 82 : (1948) M.W.N. 92 : 61 L.W. 91 : A.I.R. 1948 Mad. 386; *Mrs. P. Subbiah (alias) Dhanalakshmi Subbiah* v. *Venkatathirumuthuraja and others*, (1975) 1 M.L.J. 311 : 88 L.W. 354.

Appeal against the order of the Court of the II Additional Subordinate Judge of Coimbatore, dated 2nd December, 1974 and made in E.P. No. 519 of 1973 in O.S. No. 322 of 1963.

M.R. Narayanaswami and *K. Venugopal*, for Appellants.

R. Gopalaswami Iyengar and *R. Desikan*, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, CJ.—Respondents 4 and 5 in the Court below are the appellants. The first respondent had obtained a money-decree against the first respondent in the Court below, one S.S. Fakir Mohamed, in O.S. No. 322 of 1963 in the Court

*A.A.O No. 677 of 1974. 9th February, 1976.

of the Subordinate Judge of Coimbatore. The decree was made on 8th October, 1964. Fakir Mohamed, the judgment-debtor, a film producer, ran into debts. He was also carrying on business as a beedi merchant. On 19th February, 1968, Fakir Mohamed and his son Habibur Rahiman, the third respondent, on, the one hand, and the first appellant Abdul Jabbar on the other, entered into a partnership under the name and style of Majeeth Mark S.P.S. Beedi Factory, Coimbatore. Majeeth Mark S.P.S. Beedi Factory by partner Abdul Jabbar, the first appellant. figures as the second appellant. Fakir Mohamed died on 18th January, 1972. His widow, the 2nd respondent instituted O.S. No. 48 of 1972 for dissolution of the firm and taking its accounts. Abdul Jabbar was a party-defendant in that suit. It ended in a consent decree which declared that the partnership stood dissolved as on 18th January, 1972, the day Fakir Mohamed died. The accounts of the firm were filed in Court which were said to have established that no amount whatever was due to the late Fakir Mohamed from out of the firm, but he was only indebted with his son to the tune of over Rs. 3½ lakhs to Abdul Jabbar. The first respondent in the appeal took out execution of the decree. He impleaded Fakir Mohamed (died) as the first respondent, his widow and his son as respondents 2 and 3, Abdul Jabbar as the 4th respondent, and Majeeth Mark S.P.S. Beedi Factory by partner Abdul Jabbar, as the 5th respondent. The petition for execution under Order 21, rule 11 (2) of the Code of Civil Procedure, was to implead respondents 2 to 5 in the Court below as legal representatives of the first respondent, Fakir Mohamed and for appointment of a receiver under Order 21, rule 49 (2) of the Code to sell and collect the amounts earned by Fakir Mohamed in the partnership business and to pay the same to the decree-holder in discharge of the decree-debt. The Court below granted both the prayers. It was of the view that although Fakir Mohamed was the sole proprietor of Majeeth Mark S.P.S. Beedi, it became a Firm or Partnership as from 19th February, 1968, and that in view of the recital in the Partnership Deed, the partnership could not be dissolved by the parties unless all the liabilities mentioned in the Schedule were discharged by Abdul Jabbar. The Court below thus thought that notwithstanding the death of Fakir Mohamed and the consent decree mentioned by us, the partnership continued since Abdul Jabbar had not discharged all the debts. This was the basis for the order the Court below made under Order 21, rule 49 (2), since, according to the Court below, Abdul Jabbar was in possession of Majeeth Mark S.P.S. Beedi Factory after the death of Fakir Mohamed, he was an intermeddler with, and in possession of the beedi business as a partner. The Court said that the 4th respondent was in possession of part of the estate of the deceased. So, it held Abdul Jabbar was a legal representative of the deceased Fakir Mohamed.

2. The propriety of the order of the Court below making the appellants as the legal representatives of the deceased in the execution of the decree against them, and appointment of a receiver and other relief under Order 21, rule 49 (2) made by the Court below, is questioned before us.

3. The contention for the appellants was that in no view of the matter can they be regarded as the legal representatives of the deceased Fakir Mohamed. We are of opinion that the appellants are right in their contention. A "legal representative" as defined by section 2 (11) of the Civil Procedure Code is a person who in law represents the estate of a deceased person, and includes any person who intermeddless with the estate of the deceased, and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued. It is clear that the appellants do not represent the deceased. They are not his heirs. The first appellant is a stranger, and the second appellant is the business which was once the property of the deceased and later on the firm of dissolved partnership. They are also not sued in a representative character. Nor has any estate of the deceased devolved on them. The only ground the Court below relied on to hold them to be legal representatives of Fakir Mohamed was that the first appellant was in possession of Majeeth Mark S.P.S. Beedi Factory and so was in pos-

session of a part of the estate of the deceased: thus the first appellant intermeddled as a partner in the beedi business of the deceased as on 19th December, 1968, 4 years after the decree was made in favour of the decree-holder. The first appellant's stand is that the partnership stood dissolved on 18th January, 1972, the day Fakir Mohamed died, the debt due to the decree-holder was not one shown in the schedule of the partnership of the firm, the firm was called upon to discharge through the first appellant, and the firm had nothing to do with the decree debt. The appellants also contend that the first appellant was in possession of the beedi business Majeeth Mark S.P.S. Beedi Factory after the death of Fakir Mohamed not as his representative, but in his own right and in accordance with the terms of the compromise decree in O.S. No. 48 of 1972. We think, the stand of the appellant is unassailable. If the first appellant is in possession of the second appellant business it is not as an intermeddler of the estate of the deceased Fakir Mohamed, but in his own right, and adversely to the estate of the late Fakir Mohamed. Unless the first appellant's possession of the business could be said to be in a representative capacity, that he represented the estate of the deceased by interposing in its administration and getting into possession of it, it cannot be said that he was an intermeddler within the meaning of section 2 (11) of the Code. It may be that the expression 'legal representative' includes any person who intermeddless with the estate of a deceased partner. But as held in *Chockalingam Chettiar* v. *Karuppan Chettiar*[1], the intermeddling must involve the assumption of a representative capacity in relation to an estate, and not in assertion of a claim of right adversely to the estate of the deceased. The possession of the second appellant beedi business in the hands of the first appellant is not, therefore, as an intermeddler so as to make the first appellant and also the second appellant as legal representatives of the deceased. The first appellant's possession is traceable to the formation of the firm of partnership between the deceased and his son on the one part, and the first appellant on the other, and after the death of Fakir Mohamed and dissolution of the partnership to the terms of the consent decree in O.S. No. 48 of 1972. We hold, therefore, that the appellants cannot be regarded as the legal representatives of the deceased Fakir Mohamed.

4. The order of the Court below under Order 21, rule 49 (2) is also defective. Rule 49, as we understand its language, applies only to an existing partnership, and not a dissolved one. Sub-rule (2) of the rule speaks of an application of the holder of a decree against a partner, and the Court making an order charging the interest of such partner in the partnership property, and profits with payment of the amount due under the decree. That can have reference only to an existing partnership. It is even more clear by reference to sub-rule (3) which gives liberty to the other partner or partners to redeem the interest charged, or in the case of a sale being directed, to purchase the same. Where at the time execution is sought the firm is dissolved and no longer in existence, the provisions in the Partnership Act for winding up its business in the way mentioned therein will apply. Order 21 rule 49 (2) will have no application. The Court below, in our opinion, is not right in its view that the rule will apply also to a dissolved firm. In some part of the judgment of the Court below it was stated that the partnership, notwithstanding the death of Fakir Mohamed, continued to exist. For taking that view it relied on paragraph 4 of Exhibit B-1 which was the Deed of Partnership which said that the partnership shall not be dissolved by parties unless and until all the liabilities mentioned in the schedule thereto were discharged by the party of the second part namely, the first appellant, and that if the partnership was put an end to by the parties of the first part, that is to say, Fakir Mohamed and his son Habibur Rahiman, the party of the second part, the appellant, should continue the business till all the amounts due to him were fully realised. We do not agree with the Court below that this statement of the Partnership Deed amounted to the position that even though Fakir Mohamed died, still the firm of partnership will continue. This clause

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1. (1948) 1 M.L.J. 82: (1948) M.W.N. 92: 61 L.W. 91 : A.I.R. 1948 Mad. 386.

in the partnership deed was inserted for the security of the first appellant who had advanced moneys to the firm. It does not appear also that the decree debt in question was included in the recital of the partnership. In one place in the order of the Court below it was observed that the consent decree in O.S. No. 48 of 1972 was collusive. That decree declared that the partnership stood dissolved as on the date of death of Fakir Mohamed. There is no basis whatever in the record to support the observation of the Court below that the consent decree was collusive. It is not in dispute that there were still large outstandings due from the erstwhile firm to the first appellant. Since we are of the view that the firm stood dissolved the order made by the Court below under Order 21, rule 49 (2) cannot be sustained. N. S. Ramaswami, J., in *Mrs. P. Subbiah (alias) Dhanalakshmi Subbiah* v. *Venkatathirumuthuraja and others*[1], opined that Order 21, rule 49 applied to an existing firm, and not a dissolved or erstwhile one. We concur with him.

5. The appeal is, therefore, allowed with costs.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Veeraswami, CJ.* and *S. Natarajan, J.*

The Correspondent, Kayalpattinam Arumuganeri High School, Arumuganeri .. *Appellant**

v.

Esther Selvaraj and Director of School Education, Madras-6 .. *Respondents.*

Master and Servant—School Teacher—Employment in Private Institution—Attaining age of superannuation—Middle of the academic year—Termination of services—Government order—Direction to school Authority for continuance of teacher in service till the end of the academic year—Government order has no force of law—Only administrative order.

Employment in private institutions is entirely governed by contractual basis. No rules having force of law apply to the service conditions. It may be that the Government, in giving effect to their policies on education may give directions from time to time which it is open to the private institutions to follow or not. The only control the Government may have on such institutions is through the aid which they extend to such institutions. The order of Government, is certainly not a rule having the force of law. It is merely an administrative order which the institution may choose to ignore whatever may be the consequences. It cannot be said that the Government order by its own force brought about any change in the conditions of service governed by a contract. A private institution is not regulated by a Government order in the matter of conditions of service of its own employees which are left to contractual relationship. [*Paras.* 2 *and* 3.]

Case referred to:—

Union of India v. *K.P. Joseph*, (1974) 2 S.C.J. 276: (1973) 2 S.C.R. 752: A.I.R. 1973 S.C. 303.

Appeal under clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice K.N. Mudaliyar, dated 13th December, 1973 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 1031 of 1971 presented under Article 226 of the Constitution of India to issue a writ of *mandamus* directing the 2nd respondent herein to modify his order, dated 10th March, 1969 in R.C.No. 153570/C7 of 1968 to direct the 1st respondent herein to re-instate the petitioner herein in the K.A. High School at Arumuganeri with retrospective effect from 16th July, 1968 so as to enable the petitioner to claim appropriate monetary remedies.

M.R. Narayanaswami and *R. Srinivasan*, for Appellant.

K.R. Thiagarajan and *K. R. Natarajan*, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, CJ.—The appellant, a private High School at Arumuganeri, complaints against the order of Mudaliyar, J., who on a writ petition by the first respondent,

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1. (1975) 1 M.L.J. 311 : 88 L.W 354.

* W.A. No. 98 of 1974. 9*th July*, 1975.

directed the appellant to pay her salary and allowances for the period from 16th July, 1968 to 31st May, 1969. The first respondent served in the institution as a teacher. She attained the superannuation at the age of 58 on 15th July, 1968. This was brought to her notice by the appellant by a letter dated 15th April, 1968, which said that on that date she would retire. On 24th April, 1968, she preferred an appeal to the Chief Education Officer against the second respondent's correpondent's views. She took up the stand that her superannuation was to be at 60. Pending disposal of the appeal and on the advice of the Chief Education Officer, she was continued in service up to 5th August, 1968, when her appeal was dismissed. A further appeal she filed, but that was rejected on 19th March, 1969, by the Director of School Education. The first respondent filed the writ petition on 9th December, 1970 after a delay of nearly 18 months from the date of the order of the Director of School Education. In her writ petition her prayer was that the Court should give a direction to the School to modify its order dated 10th March, 1969 directing her to retire on 15th July, 1968, and to direct the school to reinstate her in the school with retrospective effect from 16th July, 1968, so as to enable her to claim appropriate monetary remedies and pass such further orders. Mudaliyar J., did not give the relief that she asked for, but gave the relief which we mentioned on the basis of an order of the Government, G.O.Ms. No. 1762, Education, dated 24th September, 1965. In that order, the Government directed that any teacher attaining superannuation during the course of the academic year be permitted to continue till the end of the school academic year subject to the usual conditions. The Government order further said that the Director of Secondary Education should issue necessary revised instructions to all concerned. The relief granted, as we said, by Mudliayar, J., was on the basis of this Government order.

2. It is pressed upon us for the appellant, and quite rightly, that the order under appeal cannot be sustained. As already noticed, the appellant is a private institution. Employment in the institution is entirely governed by contractual basis. No rules having the force of law apply to the service conditions. It may be that the Government in giving effect to their policies on education may give directions from time to time which it is open to the private institutions to follow or not. The only control the Government may have on such institutions is through the aid which they extend to such institutions. The order of Government, which formed the basis of the order under appeal is certainly not a rule having the force of law. It is merely an administrative order which the institution may choose to ignore whatever may be the consequences. We cannot say that the Government order by its own force brought about any change in the conditions of service governed by a contract between the appellant and the first respondent.

3. Counsel for the first respondent relied on *Union of India* v. *K.P. Joseph*[1], where it was observed by the Supreme Court that to say that the Government order could never confer any right would be too wide a proposition and that there were administrative orders which conferred rights and imposed duties. The Court further observed that it was because an administrative order could abridge or take away rights that Courts had imported the principle of natural justice of *audi alteram partem* into this area. We are afraid that this citation is not apposite and does not in any way support the first respondent. That was a case of a Government servant, more particularly in the Indian Army, and the question there was whether a general office memorandum touching the conditions of service, as an administrative order, which conferred certain rights on a Government employee, could be enforced through Courts of law. That is not the case before us. A private institution is not regulated by a Government order in the matter of conditions of service of its own employees which are left to contractual relationship. We are unable, therefore, to agree with the learned Judge that the first respondent is entitled

1. (1973) 2 S.C.R. 752: (1974) 2 S.C.J. 276: A.I.R. 1973 S.C. 303.

to the relief which he has given on the strength of the Government order.

4. We may also mention that the very Director of School Education, who was directed by the Government order concerned to give effect to it, had himself dismissed the appeal of the first respondent.

5. The appeal is therefore, allowed. No costs.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*N.S. Ramaswami, J.*

K. Ramachandran Chettiar .. *Appellant**

v.

G. Lakshminarayanaswami Chettiar ... *Respondent.*

(A) *Landlord and Tenant—Building with two floors—Lease of building with machinery etc. for a fixed period—Tenant committing wilful default in payment of rent—Rent Control proceedings by landlord in respect of first floor—Eviction ordered—Execution of order—Possession of first floor taken by landlord—Subsequent suit for ejectment in respect of ground floor—Decision in Rent Control proceedings does not operate as* res judicata *in ejectment suit.*

(B) *Transfer of Property Act (IV of* 1882*), sections* 106 *and* 116*—Tenant holding over—Purpose of lease "manufacture"—Suit for ejectment—Six months' notice necessary.*

(C) *Lease—Building with machinery etc.—Lease of building with hiring of the machinery—Not a composite lease—Suit in ejectment—Jurisdiction of Civil Court not ousted—Decree cannot be executed.*

The question that arose for deterimnation in the instant case by the Rent Controller and the Appellate Authority as well as the Revisional Court was only whether there were grounds as contemplated under Act XVIII of 1960 for evicting the tenant. The question whether separate rent for the first floor was payable and if so whether the rent was Rs. 150 a month might have been considered incidentally, but it cannot be considered that those are matters which fall within the jurisdiction of the Rent Control Court. The decision of Special Tribunals not on matters which directly arise before them but in respect of incidental matters would never be *res judicata* as against the parties agitating the questions in a civil Court. [*Paras.* 6 *and* 8.]

Under section 116 of the Transfer of Property Act, in the absence of an agreement to the contrary, in respect of a tenant holding over, a lease is renewed from year to year or from month to month according to the purpose for which the property is leased as specified in section 106. The purpose for which the property is leased in the present case is manufacture. Therefore as per section 116 read with section 106 of the Transfer of Property Act, six months' notice is necessary. The presumption that arises by reserving a monthly rent that the tenancy was from month to month has no relevance when section 116 applies. [*Para.* 16.]

The mere fact that rent was being paid not according to the month of tenancy but according to the calendar month could not alter the month of tenancy itself as one from the first of the calendar month. [*Para.* 17.]

The fact that separate rents for the buildings and separate hire charges for the building and separate hire charges for the machinery etc., are mentioned in the document of lease is not conclusive to show that the lease was not a composite one. But if it is clear that what was demised was not a business as such, there is no reason why the lease deed shall not be construed as one for the building coupled with the hiring of certain items of machinery etc. mentioned in the document. [*Para.* 20.]

The provisions of Act XVIII of 1960 would be applicable as far as the building is concerned. Of course on that score the suit in ejectment is not to be dismissed. The fact that the provisions of Act XVIII of 1960 are applicable does not mean the jurisdiction of the civil Court to enter-

* Appeal Nos. 774 of 1970 and 126 of 1975. 25*th August,* 1975.

tain a suit in ejectment is ousted. However the decree in ejectment cannot be executed unless the plaintiff obtains an order of eviction as per the provisions of the above said Act. [*Para.* 21.]

Cases referred to :—

Venkatachala v. *Ramachandra*, (1961) 1 M.L.J. 188: 74 L.W. 81 : I.L.R. (1961) Mad 333: A.I.R. 1961 Mad. 423 ; *Daryao* v. *The State of Uttar Pradesh*, (1962) 1 S.C.J. 702: (1962) 2 An.W.R. (S.C.) 16: (1962) 2 M.L.J. (S.C.) 16: (1962) 1 S.C.R. 574 : A.I.R. 1961 S.C. 1457; *Ram Kumar Das* v. *Jagadish Chandra Deb Dhabal Deb*, 1952 S.C.R. 269 : 1951 S.C.J. 813: 65 L.W. 219: A.I.R. 1952 S.C. 23; *Ram Prasad Panday* v. *Debi Prasad Deb*, (1919) 49 I.C. 974; *B.P. Bhagwanddin* v. *D.B. Prabhu Prasad*, (1963) 2 S.C.J. 441: (1963) 3 S.C. R. 312: A.I.R.1963 S.C. 120; *Rajo Chetty* v. *Jagannatha Das Govindas*, (1949) 2 M.L. J. 694: 62 L.W. 860: A.I.R. 1950 Mad. 284: *Uttamchand* v. *S.M. Lalwani*, A.I.R. 1965 S.C. 716; *Pals Theatres* v. *Abdul Gaffoor Sahib*, (1972) 2 M.L.J. 554: 86 L.W. 65: A.I.R. 1974 Mad. 155; *Nanda Rao* v. *Lakshmanaswami Mudaliar*, (1969) 1 M.L.J. 153; *Manindra Chandra* v. *Rangalal*, A.I.R. 1918 Cal. 443; *Rajaiah Odayar* v. *Panchapakesa Iyer*, I.L.R. (1964) 2 Mad. 352: 77 L.W. 354: (1964) 2 M.L.J. 93: A.I.R. 1964 Mad. 513.

Appeals against the decree of the City Civil Court, (II Assistant Judge) Madras, dated 16th April, 1970 and passed in O.S. No. 5594 of 1967 and O.S.No.980 of 1966 respectively.

S. Nainarsundaram, V. Natarajan and *V. Nicholas*, for Appellant.

Mrs. A. Kamaladevi and *C. Hanumantha Rao*, for Respondent.

The Court delivered the following

JUDGMENT.—A.S. No. 126 of 1975 is against the decree and judgment in O.S. No. 980 of 1966 and A.S. No. 774 of 1970 is against the decree and judgment in O.S. No.5594of 1967 on the file of the City Civil Court, Madras. The appellant in both the matters is one and the same, he being the sole defendant in both the suits. The respondent in both the appeals is also one and the same person, being the plaintiff in the two suits, which were tried jointly.

2. The plaintiff (respondent) is no other than the father-in-law of the defendant (appellant). They entered into a registered lease agreement as per the original of Exhibit A-1, dated 9th November, 1959 under which the defendant became a lessee under the plaintiff of the building bearing Door No. 1-A, Ponnappa Chetti Lane, Triplicane, Madras, with certain machinery etc. connected with running an oil mill. The document describes the building in one schedule and under the heading schedule relating to machinery gives the details of the items of machinery etc., given possession of by the plaintiff to the defendant. According to the terms of the document, the defendant was to be a lessee for a period of five years from 9th November, 1959 to 8th November, 1964 and pay in all a monthly sum of Rs. 150 made up of Rs. 25 as rent for the building and Rs. 125 towards the hire charges of the machinery etc.

3. O.S.No. 980 of 1966 (out of which A.S. No. 126 of 1975 arises) is a suit in ejectment but it relates only to the ground floor of the building with the machinery etc. According to the plaintiff there was a separate oral lease agreement between the parties in respect of the first floor, the monthly rent payable for the said first floor being Rs. 150. On the basis of that and on the allegation that the defendant had committed wilful default in payment of rent (for the first floor) the plaintiff had successfully obtained an order of eviction in the Rent Control Court and that order has not only become final but has also been executed and the defendant has already been evicted from the first floor of the building. O.S.No. 5594 of 1967 (out of which A.S. No. 774 of 1970 arises) is a suit for recovery of arrears of rent in respect of only the first floor. The plaintiff has averred in the plaint that upto 15th July, 1963, the defendant had paid the monthly rent of Rs. 150 for the first floor and thereafter defaulted to pay the same. The suit for arrears of rent came to be filed in 1967 and the plaintiff stated that he is restricting his claim for arrears of rent in respect of the first floor for a period of three years prior to the presentation of the plaint in O.S. No. 5594 of 1967.

4. The defendant *inter alia* contended that the original of Exhibit A-1 covered the entire building and that there was no

question of any oral agreement for paying the monthly rent of Rs. 150 separately for the first floor. This suit had been decreed by the Court below on the sole ground that the decision of the Rent Controller ordering eviction of the defendant from the first floor, incidentally finding that the monthly rent for the first floor was Rs. 150, is *res judicata* against the defendant now contending that no separate rent was payable in respect of the first floor. The lower Court did not even consider the terms of Exhibit A-1 in order to find out whether what was demised under that document was only the ground floor with the machinery as contended by the plaintiff or whether the entire building inclusive of the first floor had been demised, because, in its view, the decision of the Rent Controller is *res judicata.*

5. As for the other suit (O.S.No. 980 of 1966) which is one in ejectment of the ground-floor with the machinery therein, the defendant *inter alia* contended that the provisions of Act XVIII of 1960 apply to the lease in so far as it related to the building, that in respect of the machinery the suit is time-barred regarding certain items inasmuch as those items were claimed only by way of amendment, the application for which was filed only on 18th March, 1970 and the time having begun to run from 31st May, 1965, the date of termination of lease, and that, in any event, the suit should fail for want of proper notice to quit. The Court below rejected all these contentions and has decreed the suit.

6. First of all, I would deal with the question as to whether the decision in the Rent Control proceedings initiated by the plaintiff in order to evict the defendant from the first floor of the building is *res judicata* regarding the question whether the defendant was bound to pay separate rent of Rs. 150 per month in respect of the first floor. I am quite clear that the said decision in the Rent Control proceedings is not *res judicata* against the defendant raising the plea in the present suit. There can be no dispute that the question that arose for determination by the Rent Controller and the Appellate authority as well as the Revisional Court was only whether there were grounds as contemplated under Act (XVIII of 1960) for evicting the tenant. The question whether separate rent for the first floor was payable and if so whether the rent was Rs. 150 a month might have been considered incidentally, but it cannot be contended that those are matters which fall within the jurisdiction of the Rent Control Court. There are two decisions of this Court which are clearly applicable to the present case. In *Venkatachala* v. *Ramachandra*[1], the Revenue Court under Act XXV of 1955, had held that the tenants were not in arrears of rent and that therefore they were not liable to be evicted, and when the landlord filed a suit in Civil Court for recovery of arrears of rent, the above decision of the Revenue Court was pleaded as *res judicata* against the landlord. A Division Bench of this Court held that the landlord is not so barred. It was pointed out that the decision of the Revenue Court that there were no arrears of rent was only incidental to the exercise of the jurisdiction to grant eviction, that the Act nowhere clothes the Revenue Officer with jurisdiction to grant relief to the landlord for recovery of arrears of rent, that the landlord could recover arrears of rent only through the medium of the civil Court and that therefore the decision of the Revenue Court as to whether a cultivating tenant was in arrears of rent or not would not operate as *res judicata* in a subsequent civil suit between the parties to recover arrears of rent.

7. In *Rajaiah Odayar* v. *Panchapakesa Iyer*[2], Ramachandra Iyer, C.J., held that the determination of the question whether a cultivating tenant is in arrears of rent or not for the purpose of ordering his eviction by the Revenue Court, under the provisions of section 3 of the Madras Cultivating Tenants' Protection Act (XXV of 1955), will not operate as *res judicata* in a subsequent civil suit filed by the landlord against the tenant for recovery of arrears of rent. The learned Judge pointed out that the determination in an eviction petition filed by the landlord on the ground of default in payment of rent on

1. I.L.R. (1961) Mad. 333 : (1961) 1 M.L.J. 188 : 74 L.W. 81 : A.I.R. 1961 Mad. 423.
2. I.L.R. (1964) 2 Mad. 352 : 77 L.W. 354 : (1964) 2 M.L.J. 93 : A.I.R. 1964 Mad. 513.

the part of the cultivating tenant, whether there were arrears of rent or not, is purely incidental and can be regarded as made only for the limited purpose of exercising jurisdiction under section 3 (3) or 3 (4) of Act XXV of 1955. These decisions would squarely apply to the present case.

8. Mr. V. N. Srinivasa Rao, learned counsel for the plaintiff (respondent) drew my attention to *Daryao and others* v. *The State of Uttar Pradesh and others*[1], where it has been observed that it is doubtful if the technical requirements prescribed by section 11, Code of Civil Procedure, as to the competence of the first Court to try the subsequent suit is an essential part of the general rule of *res judicata*. It is true that in the present case only the principles of *res judicata* are sought to be applied and not section 11, Code of Civil Procedure. Even so, as has been pointed out by this Court in the two decisions referred above, decisions by special tribunals not on matters which directly arise before them but in respect of incidental questions would never be *res judicata* against the parties agitating the questions in a Civil Court. The observation of the Supreme Court does not in any way go counter to the above two decisions, for, in those cases (as well as in the present case) it is not on the incompetence of the Court to try the subsequent suit, but on the ground that the question did not directly arise in the earlier proceeding (though incidentally it had been considered), it was held that the incidental finding did not act as *res judicata*.

9. On merits it is impossible to believe the case of the plaintiff that there was an oral agreement between the parties by which the defendant was bound to pay a sum of Rs. 150 a month separately for the first floor. This plea of the plaintiff is directly against the terms of Exhibit A-1, the lease deed. A perusal of that document undoubtedly goes to show that what was demised was the entire building (with the machinery) and not merely the ground floor (with the machinery). Even in the schedule to the document, the entire building is described and the description is not only of the ground floor. In the face of this document, I really do not see how it is open to the plaintiff to put forward a case that there was an oral agreement by which the defendant was bound to pay a separate rent of Rs. 150 per month for the first floor.

10. From the evidence on record, it is seen that the building originally belonged to the defendant's father but it had been purchased by the plaintiff, from him. Whatever that be, it is fairly clear that considering the close relationship of the parties, the defendant had been occupying the building with the permission of his father-in-law, the plaintiff, even prior to the execution of the original of Exhibit A-1. The plaintiff as P.W. 1 would say that the defendant had been occupying (the first floor) even from 1953-54 on a monthly rent of Rs. 150. There is absolutely nothing except the interested statement of the plaintiff to show that the defendant ever paid any rent for any part of the building prior to the execution of Exhibit A-1. The plaintiff who wants the Court to believe that after the execution of the original of Exhibit A-1, the defendant had been paying the monthly rent of Rs. 150 separately for the first floor, had to admit that there is no record to show such payments. Admittedly the plaintiff had never issued any receipt to the defendant for payment of the alleged rent of Rs. 150 for the first floor. The explanation for not issuing any receipt for payment of the abovesaid rent is, that as the parties are close relations, the defendant did not insist upon any such receipt. But the fact remains that after the execution of Exhibit A-1, the plaintiff has issued receipts to the defendant and as a matter of fact the plaintiff himself has produced the counterfoils of the receipts. Exhibits A-8 and A-9 are such counter foils both dated 31st March, 1961. While Exhibit A-8 shows a payment of a total sum of Rs. 2093.75 as the hire charges for the machinery from the date of Exhibit A-1 up to the date of receipt, Exhibit A-9 shows that a sum of Rs. 418.75 was paid by the defendant to the plaintiff as rent for the building, also for the same period, namely from the date of Exhibit A-1 upto the date of payment. It is also clear that

1. (1962) 1 S.C.J. 702 ; (1962) 2 An.W.R (S.C.) 16 : (1962) 2 M.L.J. (S.C.) 16 : (1962) 1 S.C.R. 574 : A.I.R. 1961 S.C. 1457.

the defendant had not been paying the rent mentioned in the document Exhibit A-I regularly. It had been collected in a lump sum on 31st March, 1961. When the plaintiff had issued receipts retaining counterfoils thereof, his glib statement that he had not issued any receipt in respect of rent for the first floor due to close relationship of the parties is certainly not worthy of credence.

11. Further the plaintiff has no consistent case as to whether separate rent for the first floor had been paid upto 15th July, 1963, though there is such a plea in the plaint. As the plaintiff had not only produced the counter foils for issuing receipts to the defendant for the rent provided under Exhibit A-1, but also had produced his account books to show the abovesaid collection, he was questioned as to why he had not produced any accounts to show that he had collected a sum of Rs. 150 a month separately for the first floor. Then the plaintiff had to concede that as he had not collected rents for the first floor he did not write accounts and file the same in Court.

12. The defendant has given evidence denying the case of the plaintiff that there was any arrangement between the parties by which the defendant had to pay the sum of Rs. 150 a month separately for the first floor. He has also spoken to the fact that he had never paid any such rent. He has put forward several other contentions including a claim of Rs. 30,000 due from the plaintiff to him. Such tall claims have no doubt not been made out but I am not now concerned with those claims made by the defendant. The question as far as O.S.No. 5594 of 1967 is concerned, is whether there was an arrangement by which the defendant had to pay a monthly rent of Rs. 150 separately for the first floor. I have already pointed out that this plea on the part of the plaintiff goes counter to the terms of Exhibit A-1. The evidence and the other circumstances in the case also indicate that the defendant had never paid any rent separately for the first floor and that there could not have been an arrangement as pleaded by the plaintiff. A.S. No. 774 of 1970 has to be allowed and O.S. No. 5594 of 1967 has to be dismissed.

13. Coming to the other appeal, three points were raised before me. The first is that the Civil Court had no jurisdiction to entertain the suit in ejectment inasmuch as Act XVIII of 1960 is applicable The contention is that the lease is of a building, though in addition there was also the hiring of the machinery. The second contention is one of limitation and that arises this way. At the time of the execution of Exhibit A-1, the defendant was given possession of *(i)* electric motor, *(ii)* electric transformer and starter; *(iii)* certain switches and wire fittings; *(iv)* three numbers of Rotary oil checkus; *(v)* counter-shaft bearing pulleys, belts etc. apart from tables, benches, scales and weights. It is common ground that after the defendant started to run the oil mill, the Rotary oil checkus had been removed and Pinto oil checkus (four in number) came to be substituted. In the plaint, originally the claim was for the Pinto oil checkus (apart from the other items of machinery etc.). Then on 18th March, 1970 the plaintiff filed an application for amendment of the plaint by which he claimed the Rotary oil checkus (three in number) or their value. The lease had been terminated with effect from 31st May, 1965. As the date of application for amendment by which the Rotary oil checkus were claimed for the first time is beyond three years of the date of termination of the lease, the contention on behalf of the defendant is that the claim regarding the same is barred by limitation. The third contention is that in any event the suit should fail for want of proper notice to quit.

14. I shall take up the third contention first. As seen earlier, Exhibit A-1 provides for a lease for five years from 9th November, 1959 to 8th November, 1964. But admittedly the defendant continued to be a tenant even after 8th November, 1964, even though it is not anybody's case that after that date, the defendant paid any rent and that the plaintiff accepted the same with an intention to renew the lease. The plaintiff has categorically averred in the plaint that after the expiry of the lease by efflux of time, the defendant continued to be a tenant holding over.

15. The notice to quit is as per the original of Exhibit A-3 dated 11th May, 1965 terminating the lease with the mid-night of 31st May, 1965. Whether this notice is a proper notice to quit as contemplated under sections 106 and 116 of the Transfer of Property Act is the question. It is common ground that the lease under Exhibit A-1 is for running the oil mill, even though admittedly the defendant was also residing in a portion of the building. Running an oil mill is undoubtedly manufacturing purpose as contemplated under section 106 of the Transfer of Property Act and I am unable to agree with the contention of the learned counsel for the plaintiff to the contrary. Therefore, unless there is a contract or local law or usage to the contrary the lease under Exhibit A-1 must be held to be a lease from year to year terminable by six months notice expiring with the end of the year of tenancy. It is contended on the strength of an observation in *Ram Kumar Das* v. *Jagadish Chandra Deb Dhabal Deb and another*[1], that in the present case monthly rent having been reserved, the tenancy should be presumed to be one from month to month and not year to year. But such a presumption has no place in the present case because of the provisions contained in section 116 of the Transfer of Property Act. That section is certainly attracted because, as already seen, the plaintiff has categorically averred that the defendant is a tenant holding over. It is no good saying that admittedly after the determination of the lease under Exhibit A-1, by efflux of time, there was no payment of rent and that there is nothing to show that the plaintiff had assented to the defendant continuing in possession of the demised property. It is true that there is no evidence regarding such assent on the part of the landlord as contemplated under section 116. But when there is a clear admission on the part of the plaintiff himself that the defendant is a tenant holding over, I fail to see how the question of want of evidence about the landlord continuing in possession arises. It is quite obvious that because of the close relationship between the parties, the plaintiff as landlord had assented to the defendant continuing in possession and that is why the plaintiff himself had stated in the pleadings that the defendant is a tenant holding over.

16. Under section 116 in the absence of an agreement to the contrary, in respect of a tenant holding over, the lease is "renewed from year to year or from month to month according to the purpose for which the property is leased as specified in section 106". I have already held that the purpose for which the property is leased is 'manufacture'. Therefore as per section 116 read with section 106 of the Transfer of Property Act, six months notice is necessary. The presumption that arises by reserving a monthly rent under Exhibit A-1 that the tenancy was from month to month has no relevance when section 116 applies. It has been rightly pointed out, if I may say so with respect, in *Ram Prosad Panday* v. *Debi Prosad Deb*[1], that whatever the terms which govern the original lease, in a case coming under section 116, in the absence of any agreement to the contrary, the renewal of the lease must be regarded as from year to year or from month to month according to the purposes for which the property is leased. It was held that where the lease is for agricultural or manufacturing purposes, it is to be regarded as a lease from year to year and in the case of a lease for other periods, it is to be regarded as renewed from month to month.

17. Even if the defendant is not entitled to six months notice and he is entitled to only 15 days' notice, undoubtedly the notice in this case is not proper under section 106 of the Transfer of Property Act. If the tenancy is a monthly one, there can be no doubt the month of tenancy is from 9th of a particular month and ending with the 8th of the succeeding month as per the English calendar. The lease deed, as already seen is dated 9th November, 1959 and it says that the monthly rent is payable by the 10th of the succeeding month. The contention on behalf of the plaintiff is that there is an averment in the plaint that the defendant was paying the rent according to the calendar month and there is no denial of such averment and that therefore it

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1. 1951 S.C.J. 813 : 65 L.W. 219 : (1952) S.C.R. 269 : A.I.R. 1952 S.C. 23.

1. (1919) 49 I.C. 974.

must be held that the month of tenancy is from the first of the calendar month. It is clear that in spite of the abovesaid assertion in the plaint admittedly the defendant had never paid rent according to calendar month. The only payment he made was on 31st March, 1961 for the accrued rents from the date of the lease deed upto the date of payment." However, as the plaintiff has averred that the defendant had been paying rent according to calendar month and such averment has not been traversed by the written statement, I may take for the present purpose that rent was being paid according to the calendar month. But that fact would not in any way alter the month of tenancy. The month of tenancy is from the 9th of a particular month to the 8th of the succeeding month. The mere fact that the rent was being paid not according to the month of tenancy but according to the calendar month would not alter the month of tenancy itself as one from the first of the calendar month.

18. *B. P. Bhagwandin* v. *D. B. Prabhu Prasad*[1], is a case where the month of tenancy was according to Hindu calendar but the rent was being paid according to the British calendar. The Gujarat High Court which heard the case earlier held that as rent is payable according to English calendar, the tenancy must be deemed to be one according to the said calendar from the first of the month to the end of the month. The Supreme Court pointed out that that view of the Gujarat High Court is wrong. At page 447, the Supreme Court observed:

> "The tenancy can be from month to month and the recoverability of the rent may not be from month to month, and may, under the contract, be based on any period says a quarter or half year or a year. There is nothing in law to make the month for the period of recovering rent, synchronising with the period of the month of the tenancy. The tenancy must start by a particular date and consequently its month would be the month from that date, according to the calendar followed."

Therefore, assuming that the defendant had been paying rent according to calendar month, the month of tenancy is certainly not from the first of the calendar month till the end of the said month, but it is only as provided in the document itself. There can be no doubt that the lease commenced on the 9th of a particular month and therefore the month of tenancy would be from the 9th of a particular month till the 8th of the succeeding month. The notice in this case terminated the tenancy by the mid-night of 31st May, 1965. That is certainly not in accordance with section 106 of the Transfer of Property Act as 15 days notice ending with the month of tenancy has not been given.

19. It is contended on behalf of the plaintiff that the defendant has not specifically stated in the written statement that even if 15 days' notice is sufficient, the notice is not proper. The plea that the notice to quit is not proper has been specifically taken. The defendant has pleaded that he is entitled to six months' notice. Even if it is to be held that he is not entitled to such notice one has to find whether 15 days' notice has been given in accordance with section 106. Certainly it is not a case where the defendant has not taken the plea that the notice to quit is not proper.

20. Coming to the other two contentions, the first point raised is that the lease is of a building coupled with hiring of the machinery and that therefore the provisions of Act XVIII of 1960 are applicable. The contention on behalf of the plaintiff is that the lease is a composite one inasmuch as a running business as such was leased. It is clear from *Raja Chetty* v. *Jagannatha Das Govindas*[1], *Uttamchand* v. *S.M. Lalwani*[2] and *Pals Theatres* v. *Abdul Gaffoor Sahib*[3], that if a business as a going concern is the subject-matter of the lease it cannot be contended that the Rent Control Act would be applicable. In the case before the Supreme Court what was leased was a Dal Mill as a going concern. In the other two decisions which are by Division Benches of

1. (1963) 2 S.C.J. 441: (1963) 3 S.C.R. 312: A.I.R. 1963 S.C. 120.

1. (1949) 2 M.L.J. 694 : 62 L.W. 860 : A.I.R 1950 Mad. 284.
2. A.I.R. 1965 S.C. 716.
3. (1972) 2 M.L.J. 554: 86 L.W. 65 : A.I.R. 1974 Mad. 135.

this Court what was demised were cinema houses as going concerns. It has been pointed out in *Raja Chetty* v. *Jagannatha Das Govindas*[1], that what was leased was not merely building and furniture but a talkie house' (as a going concern) and to split up such lease into separate contracts of lease of the building and hire of furniture etc. is to destroy it altogether. As I said, a cinema house as a going concern was the subject matter of the lease in that case. In *Nanda Rao* v. *Lakshmanaswami Mudaliar*[2], which was a case of lease of a cinema theatre, Natesan, J., held that it was a lease of a building and Act XVIII of 1960 applied, as it was not a lease of a running cinema business with all its accessories. At page 162 the learned Juge observes that the Act controls and regulates letting of buildings and not transfer of business concerns and running business with building. As the lease in that case was not of a running business it was held that the Act applied. Similarly in the present case the document itself goes to show that what was leased was not a going concern as such. It is true that it was contemplated that the defendant would run an oil mill in the premises. It is also true that certain machinery for the above purpose had been given possession of with the building. But there is nothing to show that all that was required for running an oil mill were the items given possession of by the plaintiff to the defendant. Further from the very fact that the document states that the lessee has to obtain the necessary Corporation licence, though in the name of the lessor, goes to show that till the date of the document no such licence had been issued to the lessor (plaintiff) and that therefore what was demised was not a going concern as such. The fact that separate rents for the building and separate hire charges for the building and separate hire charges for the machinery etc. making up a total of Rs. 150 are mentioned in the document is no doubt not conclusive to show that the lease was not a composite one. But as it is clear that what was demised was not a business as such, there is no reason why the lease deed should not be construed as one for the building coupled with the hiring of certain items of machinery etc. mentioned in the document.

1. (1949) 2 M.L.J. 694: A.I.R. 1950 Mad. 284.
2. (1969) 1 M.L.J. 153.

21. That means, the provisions of Act XVIII of 1960 would be applicable as far as the building is concerned. Of course on that score the suit in ejectment is not to be dismissed. The fact that the provisions of Act XVIII of 1960 are applicable does not mean the jurisdiction of the Civil Court to entertain a suit in ejectment is ousted. However, the decree in ejectment cannot be executed unless the plaintiff obtains an order of eviction as per the provisions of the abovesaid Act. Anyway, because of my finding regarding the question of validity of the notice to quit, the plaintiff is not entitled to a decree in ejectment.

22. The question of want of notice to quit would not arise in respect of movables. I have already held that under Exhibit A-1 there is a lease of the building and hiring of the movaables, namely machinery etc. In respect of movables, there is no impediment to grant a decree in favour of the plaintiff subject to the question of limitation raised by the defendant. As far as the movables claimed in the original plaint are concerned, the claim is within time but in respect of the alternative claim made by way of amendment, there is no escaping the position that the same is barred. The Court below has held that the plaintiff is entitled to possession of the building (ground floor) and payment of the value of the machineries etc. given possession of by the plaintiff as per Exhibit A-1 at the time of the lease. (The value is to be ascertained in execution proceedings). The Court has not held that the plaintiff was entitled to the Pinto checkus (four in number) substituted by the defendant after the lease agreement. However, the decree has not been properly drafted. In the operative part of the decree it is simply stated that the defendant shall pay the cost of the machineries etc. without specifying whether the machineries are as described in the plaint originally, or as those as per the amendment. In the schedule of property, the machineries as in the original plaint (which includes four Pinto checkus) are described. The plaintiff is not entitled to the Pinto checkus as

per the judgment, for they are not covered by Exhibit A-1 and the judgment says that the plaintiff is entitled to the machineries described in Exhibit A-1 (and not to Pinto checkus). Rotary checkus (three in number) are covered by Exhibit A-1. They were claimed by way of amendment of the plaint. The question is whether this claim is within time. The Court below has held that it is not barred. But that is not correct.

23. Undoubtedly the Rotary Oil checkus claimed by the amendment are totally different from those described in the original schedule. What was asked for in the original plaint was Pinto Oil checkus, but by way of amendment Rotary Oil checkus (three in number) are sought to be substituted. The amendment application came to be filed only on 18th March, 1970. Because of the notice issued by the plaintiff he became entitled to the movables from 1st April, 1965. The period of limitation is only 3 years from 1st April, 1965 and as the Rotary Oil checkus were claimed for the first time in the application dated 18th March, 1970, that claim is barred by limitation. There can be no dispute that in respect of new properties claimed by way of amendment, the date of claim shall be taken to be the date on which the application for amendment was filed, and not the date of suit. The suit had been instituted within three years from 1st April, 1965 but the properties claimed by way of amendment have been claimed for the first time only on 18th March, 1970, the date of the application for amendment. In *Manindra Chandra* v. *Rangalal*[1], a similar view had been taken and it is stated that in respect of new properties added by way of amendment, the date of application for amendment should be taken to be the date on which the claim was made. The learned counsel for the plaintiff is not right in his contention that Article 67 would be applicable, on the basis that the lease is a composite one. I have already held that it is not a composite one and there was lease of the building plus hiring of the movables. Even assuming that there was a composite lease, Article 67 could have no application. Anyway that aspect need not be pursued further as I have already held that it was not a composite lease.

24. The result is A.S. No. 126 of 1975 is allowed in part and O.S.No. 980 of 1966 shall stand dismissed as far as the relief for possession of the building as well as regarding the movables claimed by way of amendment of the plaint is concerned. The judgment of the lower Court in that suit is otherwise confirmed. The decree of the lower Court is corrected and modified as indicated above. That means the plaintiff is entitled to the value of only the machineries described as items 1 to 3 and 5 in the plaint B Schedule, as it originally stood. (Item 4 therein is Pinto Oil checkus to which the plaintiff is not entitled). A.S.No. 774 of 1970 is allowed and O.S.No. 5594 of 1967 shall stand dismissed. Considering the relationship of the parties and other circumstances of the case, I direct the parties to bear their respective costs throughout.

R.S. —— *Appeal No.* 126 *of* 1975 *partly allowed; Appeal No.* 774 *of* 1970 *allowed.*

1. A.I.R. 1918 Cal. 443.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Veluswami Thevar .. *Appellant**

v.

Ganesa Thevar and others .. *Respondents.*

Transfer of Property Act (IV of 1882)*; section* 43*—Suit for declaration of title and possession —Widow's estate enlarging after Hindu Succession Act—Settlement by widow of the suit property on her minor daughter and another with a condition—Cancellation of settlement and sale by the widow—Suit by purchaser—Suit falls within the scope of section* 43 *of Transfer of Property Act.*

N who had a widow's estate in the suit property and which was enlarged by the coming into force of the Hindu Succession Act executed a settlement in favour of one *V*, the first defendant and her (*N*'s) minor daughter without power of alienation on condition that *V* would marry

* S.A. No. 1115 of 1972. 31*st October,* 1975.

the daughter on her attaining majority. Though there was no power to cancel this settlement, subsequently *N* cancelled the settlement and executed a sale deed in favour of one 'G', *G* filed a suit for declaration and possession of the suit property and *V* was impleaded. This suit ultimately reached the High Court in S.A. No. 1589 of 1963, where it was held that the cancellation of the gift deed by '*N*' was invalid but since '*N*' still retained an interest in the property, the matter would be solved on the attainment of the majority of the daughter depending on whether she married *V* or not. The daughter attained majority and married someone else. *G*, the purchaser from *N*, filed a suit for declaration of his title and possession. The trial Court decreed the suit which was confirmed on appeal. On further appeal to the High Court by the first defendant,

Held, in the present case, there was an erroneous representation that *N* was authorised to transfer certain immovable property. She proposed to transfer it to the plaintiff for consideration. In such a case the transfer shall, at the option of the transferee operate on any interest which the transferor, *N*, later on acquired at any time during which the transfer subsisted. It is now well settled that the contract of transfer would subsist so long as the transferee had not rescinded the contract and had not elected to seek a remedy in damages. Therefore the present case squarely fell within the scope of section 43 of the Transfer of Property Act and the appeal was liable to be dismissed.

[*Para*. 10.]

Cases referred to:—

Official Assignee of Madras and another v. *Sampath Naidu*, (1933) 38 L.W. 610 : 65 M.L.J. 588 : A.I.R. 1933 Mad. 795 ; *Jumma Musjid, Marcara* v. *Deviah*, I.L.R. (1953) Mad. 427 : (1953) 1 M.L.J. 388 : 66 L.W. 215 : A.I.R. 1953 Mad. 637 ; *Jumma Masjid, Mercara* v. *Kodimaniandra Deviah*, (1962) 2 S.C.R.(Supp.) 554: (1962) 2 S.C.J. 303 : (1962) 2 M.L.J. (S.C.) 90 : (1962) 2 An.W.R. (S.C.) 90: A.I.R. 1962 S.C. 847 ; *Hemantha Kumar Das* v. *Alliantz Stuttgarter Life Insurance Co., Ltd.*, A.I.R. 1938 Cal. 120.

Appeal against the decree of the Court of the Subordinate Judge, Tirunelveli in Appeal Suit No. 186 of 1970 preferred against the Decree of the Court of the District Munsif of Tenkasi in Original Suit No. 133 of 1969.

S. Sitarama Iyer and *S. Rajarama Iyer*, for Appellant.

K. Sarvabhauman and *T.R. Mani*, for Respondents.

The Court delivered the following

JUDGMENT.—The first defendant is the appellant. The suit was filed by the plaintiff for declaration of his title and for recovery of possession. The suit property was purchased by one Angammal as guardian for her minor son Muniyandi on 29th May, 1907. Muniyandi predeceased his mother and she executed a gift deed over the property on 25th April, 1952 in favour of her daughter-in-law Nachiarammal. In the gift deed there is a reference to a daughter having been born through Muniandi and Nachiyarammal. This daughter is named Rajammal, who was the third defendant in the suit. There can be no dispute about the fact that Nachiyarammal had only a widow's estate in the said land until the coming into force of the Hindu Succession Act, as the gift document by Angammal, who had no rights in the property, could not enlarge Nachiyarammal's interest until it was enlarged by the statute. Nachiarammal executed a settlement deed on 1st June, 1956 in favour of one Veluswami Thevar, who was the first defendant in the suit, and who is the appellant herein and also one minor daughter, Rajammal. This Veluswami Thevar is a cousin of Nachiyarammal who, after her husband's death sometime in or about 1952, had been looking after the family consisting of Nachiyarammal and her daughter Rajammal. It is stated in the document that Veluswami should marry Rajammal and that they should take the properties without any power of alienation. The male issue of the two persons would have absolute right over the property. If Veluswami did not look after the minor properly or did not marry her after Rajammal attained puberty, then thereafter he had no interest in the suit properties. She had also made it a condition that Veluswami should not alienate the properties and that if any necessity arose therefor

the properties would be alienated only by Veluswami and Nachiyarammal. The settlor had declared that she had no right to cancel the settlement.

2. On 23rd October, 1957 Nachiyarammal purported to cancel the said deed and thereafter executed a sale deed in favour of Ganesa Thevar on 24th November, 1958. The purchaser, Ganesa Thevar, filed a suit for declaration of his title and possession of the property and impleaded in the said suit Veluswami Thevar and another person. This suit ultimately reached this Court in S.A. No. 1589 of 1963. By a judgment dated 18th July, 1967, construing the settlement of 1st June, 1956, this Court held that there was a transfer *in presenti* of the suit property in favour of Veluswami and Rajammal, that the cancellation by Nachiyarammal of the said setlement deed on 23rd October, 1957 was invalid and that Nachiyarammal still retained some interest in the property because Veluswami could not by himself alienate this property. In the course of the judgment the learned Judge pointed out the following:

"The whole of this tangle would be solved within a fairly short time. The second plaintiff's daughter (Rajammal) is aged about 15, and if she indicates that she is not willing to marry which I take it can happen only after she attains majority or if she marries somebody else which I take it she can do so after she completes 16, because the second plaintiff would be her guardian and she can certainly arrange for her marriage, then this problem will be solved in one way. If, on the other hand, the second plaintiff's daughter marries the first defendant the problem will be solved in another way."

3. Rajammal attained puberty and she is said to have married one Dharmar Thevar on 1st November, 1968, and not Veluswami. The purchaser from Nachiyarammal, Ganesa Thevar, who was the first plaintiff in the earlier proceedings which came to this Court in S.A. No. 1589 of 1963 has come forward with this suit for declaration of his title and recovery of possession of the suit property. He claimed that defendants 1 and 2 had trespassed on the property and that the property belonged to him by the sale. Defendants 1 and 2 resisted the suit saying that Rajammal had not married Dharmar Thevar, that she had married the first defendant and that the sale deed dated 24th November, 1958 was not valid and true, as Nachiyarammal had no right or title to the suit property on that date. The third defendant, Rajammal, then a minor through her guardian, filed a written statement saying that she had married Dharmar Thevar and that the first defendant had forfeited his right in the suit property as there was no marriage between her and the first defendant.

4. The trial Court decreed the suit as prayed for by the plaintiff. On appeal the learned Subordinate Judge confirmed the judgment of the trial Court.

5. In the present appeal filed by the first defendant in the suit, the first question raised is as to whether the third defendant Rajammal was married to the first defendant as claimed by him or whether, she was married to the fourth defendant as claimed by them. In support of the claim that the said Rajammal had married the first defendant the learned counsel for the appellant relied on a marriage invitation Exhibit B-1 to show that the marriage between him and the said Rajammal took place on 9th September, 1968. There were Exhibits B-4 and B-5 produced by the printer, to show that 100 invitations were printed. Exhibits B-4 and B-5 were in the name of one Sivanu Thevar. This Sivanu Thevar was not examined. D.W. 3, a former M.L.A. was said to have fixed the muhurtham. He brought the invitation Exhibit B-1 and he claimed to have attended the marriage. The trial Court has discussed the above evidence in paragraphs 18 to 21 of its judgment and has disbelieved the case of the first defendant in this behalf. In paragraphs 22 and 23 the trial Court has discussed the oral evidence of D.W. 1 and also considered Exhibit B-2 which is a registered marriage agreement dated 1st November, 1968. The question as to whether Rajammal was a major at the time of the marriage has also been gone into and it was held agreeing with the submission of the fourth defendant that Rajammal was married to the fourth defendant and that she was married after she attained majority.

6. It was the correctness of this finding which was canvassed before me. The question as to whether the third defendant was married to the fourth defendant or not is to be determined on the appreciation of evidence in this case. The two Courts have concurrently taken the view that the marriage between defendants 3 and 4 took place. I see no reason to differ from the concurrent findings of fact of the Courts below.

The learned counsel for the appellant then submitted that Rajammal had not attained majority at the time when she is said to have married the fourth defendant on 9th September, 1968. The learned counsel for the respondents relied on Exhibits A-7 and A-8 to show that a child was born to Rajammal on or about 1st October, 1969 where her age was described as 20 and that Rajammal died on 7th October, 1969 when again her age was declared as 20. It was submitted that entries in the register of births and deaths could not or would not be positive evidence. Reliance is placed on the decision in *Hemanta Kumar Das* v. *Alliantz Stuttgarter Life Insurance Co., Ltd.*[1]. The proposition laid down in that case was that entries in the names of persons in a register of births or deaths or marriages could not be positive evidence of the birth, death or marriage of such persons unless their identity was fully proved. In this case there is no difficulty about the identity of Rajammal as the birth and death recorded in Exhibits A-7 and A-8 has not been disputed till this date. It is too late in the day now to say that the entries in Exhibits A-7 and A-8 cannot be given evidentiary value. The lower Court has referred to the fact in Exhibit A-11 that Rajammal had been described as being 10 years old. Exhibit A-11 is a copy of the plaint in O.S. No. 125 of 1961. If she was 10 years old then, then by the time she got married she would have been 18 so as to have attained majority. I consider that there is enough material to support, the conclusion of the Court below on this point. In fact, the question as to whether Rajammal had attained the majority does not appear to have been taken in the Courts below. However, it is unnecessary to pursue this point further in view of my conclusion that there are enough materials to show that she had attained the majority.

1. A.I.R. 1938 Cal. 120.

7. When once the third defendant is proved to have married the fourth defendant, the question that arises is whether the first defendant has any title to the suit property. In a way this matter has been decided by this Court on the earlier occasion in S.A. No. 1589 of 1963. It has been held that if Rajammal indicated that she was not willing to marry Veluswami, then the defeasance clause would operate, that Veluswami would be divested of his estate. In view of the said judgment it follows that the first defendant cannot claim any right in the property under the settlement deed of the 1st June, 1956.

8. It was then contended on behalf of the defendants that the plaintiff had no right in the suit property because Nachiyarammal had no title to the property at the time when she sold it. The answer of the plaintiff was that as a result of the defeasance clause operating the settlement in favour of Veluswami and Rajammal failed and Nachiyarammal became entitled to the property by reason of a reversion. The contention urged on behalf of the appellant was that the right which Nachiarammal had was only *spes successionis* so that any alienation thereof was prohibited by section 6 of the Transfer of Property Act. The learned counsel for the appellant relied in this connection on a decision of this Court in the *Official Assignee of Madras and another* v. *Sampath Naidu*[1]. In that case a Hindu reversioner executed a mortgage in respect of the property while it was in the possession of a limited owner. On the death of the limited owner he became entitled to the property. The question was whether section 43 of the Transfer of Property Act would apply. A Bench of this Court held that the alienation by a reversioner had been prohibited by section 6 (*a*) of the Transfer of Property Act and that section 43 did not apply in such a case to save the transaction.

9. Unfortunately for the appellant this decision has been directly overruled by a subsequent Full Bench of this Court in

1. (1933) 65 M.L.J. 588: 38 L.W. 610: A.I.R. 1933 Mad. 795.

Jumma Masjid, Marcara v. *Deviah*[1] and this decision of the Full Bench has been affirmed by the Supreme Court in the *Jumma Masjid, Mercara* v. *Kodimaniandra Deviah*[2]. Considering this very argument as to the interaction of section 6 (*a*) on section 43 of the Transfer of Property Act the Supreme Court observed at page 562 as follows :

> "The two provisions operate on different fields, and under different conditions, and we see no ground for reading a conflict between them or for cutting down the ambit of the one by reference to the other. In our opinion, both of them be given full effect on their own terms, in their respective spheres. To hold that transfers by persons who have only a *spes successionis* at the date of transfer are not within the protection afforded by section 43 would destory its utility to a large extent."

Again at page 563 it was observed as follows while noticing a contention that there could be no estoppel against a statute :—

> "But here the matter does not rest only on section 6 (*a*). We have in addition section 43, which enacts a special provision for the protection of transferees for consideration from persons who represent that they have a present title, which, in fact, they have not. And the point for decision is simply whether on the facts the respondents are entitled to the benefit of this section. If they are, as found by the Courts below, then the plea of estoppel raised by them on the terms of the section is one pleaded under, and not against the statute."

At page 568 the learned Judges observed as follows :

> "The decision in the *Official Assignee, Madras* v. *Sampath Naidu*[3], is in our view, erroneous and was rightly overruled in the decision now under appeal."

10. Unfortunately section 43 of the Transfer of Property Act does not appear to have been specifically referred to in the Courts below. That section provides as follows :—

> "43. Where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.
>
> Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option."

In the present case there was an erroneous representation that Nachiyarammal was authorised to transfer certain immovable property. She professed to transfer it to the plaintiff for consideration. In such a case the transfer shall, at the option of the transferee, operate on any interest which the transferor, Nachiyarammal, later on acquired at any time during which the contract of transfer subsisted. It is now well settled that the contract of transfee would subsist so long as the transferer had not rescinded the contract and had not elected to seek a remedy in damagess Therefore, the present case squarely fallt within the scope of section 43 of the Act and the learned counsel for the appellant was not in a position to say how, apar) from the inconsistency with section 6 (*a*- which has already been disposed of, section 43 had no scope for application herein.

11. The last point that was urged on behalf of the appellant was that the present suit was barred by *res judicata* because the plaintiff himself featured in the earlier suit and that the proceedings in that suit had ended against him. It was also submitted that the right of Nachiyarammal to alienate the property had been found against in those proceedings. The submission was that the point as to whether Nachiayarammal could alienate the property was thus barred by the principle of *res judicata.* The Courts below have pointed out that the bar of *res judicata* does not operate here because the present suit has arisen on account of changed circumstances. The changed circumstances are the marriage of Rajammal with a

1. (1953) 1 M.L.J. 388: 66 L.W. 215: I.L.R. (1953) Mad. 427: A.I.R. 1953 Mad. 637.
2. (1962) 2 S.C.J. 303 : (1962) 2 M.L.J. S.C. 90 : (1962) 2 An.W.R. (S.C.) 90: (1962) 2 S.C.R. (Supp.) 554: A.I.R. 1962 S.C. 847.
3. (1933) 65 M.L.J. 588: 38 L.W. 610: A.I.R. 1933 Mad. 795.

third party and not with the first defendant, so that the defeasance clause operated. The present cause of action is thus wholly on different facts and, therefore, the plea of *res judicata* has no scope for application. This plea was rightly rejected by the Courts below.

12. The second appeal fails and it is dismissed. No order as to costs. No leave.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*N. S. Ramaswami, J.*

Ethicon Inc. of U.S. Highway No. 202 Bridgewater Township Somerville New Jersey, U.S.A. Opposition No. MAS. 637 .. *Appellant**

v.

Equipments and Systems (P). Ltd., Narayaneeyam, 373/8, Thamaran kulagara, Tripunithura, State of Kerala .. *Respondent.*

Trade and Merchandise Marks Act (XLIII of 1958), section 11 (a)—Registration of Trade Mark restationery articles—Opposition by manufacturer of certain surgical goods—Trade mark held not similar—Opposition rejected.

The Assistant Registrar of Trade Marks registered the trade mark '*Efficon*' in respect of certain stationery articles like copying machine, carbon paper, copying ink, etc. The appellants, M/s. Ethicon Inc. of U.S.A. who manufacture certain surgical goods under the registered trade mark '*Ethicon*' opposed the registration of the trade mark '*Efficon*'. This was overruled by the Assistant Registrar.

On appeal,

Held, The goods of the appellants can have possibly only a limited market and a limited class of purchasers, who are not likely to be deceived or confused, by the appearance of the stationery goods of the respondents under the trade mark '*Efficon*'. Also, the respondents are not seeking to use the same trade mark as that of the appellants, though phonetically there might be a good deal of similarity, between one mark and the other. '*Efficon*', which is sought to be registered by the respondents is undoubtedly uninvented word as '*Ethicon*' itself is. [*Para.* 10.]

There is no likelihood of deception or confusion in registering the trade mark '*Efficon*' for the stationery goods of the respondent. [*Para.* 11.]

Cases referred to:—

T.B. and Sons v. Prayag Narain, (1940) 2 M.L.J. 151: 67 I.A. 212: 52 L.W. 25: A.I.R. 1940 P.C. 86; *Somerville* v. *Sohembri*, (1887) 12 A.C. 453; *Rustom Ali* v. *Bata Shoe Company*, A.I.R. 1957 Cal. 120; *Nestle's Products* v. *Milkmade Corporation*, A.I.R. 1974 Delhi 40; *Sunder Parmanand* v. *Caltex* (*India*) *Ltd.*, A.I.R. 1969 Bom. 24.

Appeal against the order of the Assistant Registrar of Trade Marks, dated 21st November, 1972 and made in Application No. 255064.

M. Srinivasan, for Appellant.

V. Natarajan of *M/s. King and Patridge*, *amicus curiae*, for Respondent.

The Court made the following

ORDER.—This appeal is against the order of the Assistant Registrar of Trade Marks, Madras, registering the trade mark 'Efficon' in Part A of the Register in respect of certain stationery articles such as copying machine, carbon paper, copying ink, copying paper, etc., included in class 16. The opponents, who are the appellant before me is, Ethicon Inc. of U.S.A. who manufacture certain surgical goods such as 'Sterilising Fluid and Sutures (Cat-gut)' under the registered trade mark 'Thicon'. The appellants opposed the registration of the trade mark 'Efficon' applied for by the respondents before me, on several grounds. The opposition has been overruled by the Assistant Registrar and registration ordered. Now, in this appeal, the opponents (appellants) press their opposition only under section 11 (*a*) of the Trade and Merchandise Marks Act, XLIII of 1958. It is their case that the registration of the trade mark 'Efficon' would lead to deception and confusion.

2. Regarding this aspect, the Assistant Registrar has pointed out that the goods of the opponents have a limited market

* A.A.O. No. 507 of 1973. *3rd December*, 1975.

in that, they being surgical goods, are marketed only to a limited class of purchasers, that such purchasers would well be aware of the fact that the goods are manufactured by ETHICON Inc. of the U.S.A., and marketed by their licensees in India, *viz.*, M/s. Johnson and Johnson Limited; and that,such class of purchasers would, in no way be confused or deceived if the stationery articles manufactured by the respondents herein are also in the market. It is also pointed out that the goods for which the respondents have asked for registration of the trade mark "Efficon' are of an entirely different class from those for which the appellant's trade mark relates, and that, therefore, there is no chance of any deception or confusion.

3. However, Mr.M. Srinivasan, learned counsel for the appellants, contends that in spite of the fact that the goods manufactured and marketed by the appellants are entirely of a different class from those for which the respondents seek registration of the mark 'EFFICON', still, there is the chance of the purchaser of the respondents' goods being deceived or confused to think that those goods have some trade connection with the appellants. It is pointed out that the appellants'trade mark 'THICON' has a wide reputation, that its goods have a wide market in India, and that, therefore, allowing the respondents, the use of the trade mark 'EFFICON', which is deceptively simliar to the registered trade mark of the appellant would undoubtedly cause confusion.

4. On a careful consideration, I am of the view that the opposition of the appellant under section 11 *(a)* of the Act is not sustainable.

5. The earliest case which can be usefully referred to in this connection is *T.B. & Sons* v. *Prayag Narain*[1]. That was a case when the law of Trade Mark had not been codified in India. The law then applicable to this country was the same as that in England. In that case, the owner of the trade mark called Elephant Mark, in respect of manufacturing and marketing of cigarettes and smoking tobacco sued another, who used the same mark, *viz.*, Elephant Mark,in respect of chewing tobacco. In spite of the fact that what was used by the opposite party was not merely a mark similar or deceptively similar to that of the aggrieved party, but it was one and the same mark, and the further fact that the goods of the two parties are not totally dissociated from one another, the Privy Council held that the person who was using the mark for chewing tobacco cannot be prevented from doing so on the ground of any deception or confusion. At page 87-88, their Lordships of the Privy Council observed :

> "There can obviously be no monopoly in the use of the trade mark. A manufacturer of cigarettes under an undoubted trade mark such as an animal, or any other device cannot legally object to the use of the identical mark on say, hats, or soap, for the simple reason that purchasers of any of the latter kinds of goods could not reasonably suppose, even if they were well acquainted with the mark as used on cigarettes, that its use on hats or soap denoted that these goods were manufactured (see *Somerville* v. *Sohembri*[1])

6. This case has been followed by the Calcutta High Court in *Rustom Ali* v. *Bata Shoe Company*[2]. That was a case where the registered trade mark 'bata' of the Bata Shoe Company was sought to be used by another person for lungies. On the principles laid down by the Privy Council, the Calcutta High Court held that the Bata Shoe Company cannot be heard to say that by the use of the trade mark 'bata' in respect of lungies, there is likelihood of any deception or confusion.

7. The Delhi High Court has followed the above Privy Council decision in *Nestle's Products* v. *Milkmade Corporation*[1]. That was a case where the appellants before the High Court were the registered owners of the trade mark 'Milkmaid' in respect of condensed milk. The respondent before the High Court used the Trade mark 'Milkmade' in respect of biscuits and toffees. The Delhi High Court said that the Nestle's Products Limited have no cause of action as against the respondent, who used the trade mark 'Milkmade' in respect of biscuits and toffees.

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1. (1940) 2 M.L.J. 151 : 67 I.A. 212: 52 L.W. 25: A.I.R. 1940 P. C. 86.

1. (1887) 12 A.C. 453.
2. A.I.R. 1957 Cal. 120.
3. A.I.R. 1974 Delhi 40.

8. Mr. Srinivasan very much relies on the decision of the Bombay High Court in *Sunder Permanand* v. *Caltex (India) Ltd.*[1]. That was a case where the appellants before the Bombay High Court wanted registration of the trade mark 'caltex' for watches and certain other goods. The respondent there was Caltex(India) Ltd., the reputed company, which deals in petrol and petroleum products throughout India. In spite of the fact that the goods for which the appellants therein wanted the trade mark 'caltex' to be registered had nothing to do with petrol or petroleum products, which are goods of the respondent before that High Court, it was held by the Division Bench that registration of the trade mark should be refused, for the appellant.

9. But, that case is clearly distinguishable on facts. There, the High Court has, as a matter of fact, found that the appellants had chosen the trade mark 'caltex' for registration in order to deceive the public. Further, as pointed out by the Bombay High Court, petrol and petroleum products of the respondent are used by persons all over India in cities and in villages in different walks of life, rich or poor, literate or illiterate. The potential market for the watches and other goods manufactured by the appellants before the Bombay High Court was also similar to that of the existing market of the respondent in the sense that the goods of both parties are not special goods. They are goods which would be purchased by the common man. It was under such circumstances the Bombay High Court held that in spite of the two sets of goods being of an undoubtedly different class, there is likelihood of deception or confusion. The Bombay High Court has recognised the fact that the question of deception or confusion has to be decided on the facts of each case. At pages 25 and 26, it has been observed by the Bombay High Court, thus:

> "One must never forget that what section 11 (*a*) requires to be decided is whether the mark sought to be registered is likely to deceive or cause confusion. That likelihood must vary on the facts of each case. Human conduct is varied and complex. The importance of a particular fact or facts may vary in the perspective of the totality of the facts of each case. The importance of a particular fact may increase or diminish when considered in combination with different sets of facts. What has to be decided in a case is whether on the totality of the facts of that case, it is likely that there would be deception or confusion. It would therefore, be totally misleading to rely only on some individual fact or facts from a decided case and put emphasis on them without taking into account other facts in combination with which that particular fact was looked upon as yielding any principles. All factors which are likely to create or allay deception or confusion must be considered in combination. Broadly speaking, factors creating confusion would be for example, the nature of the mark itself, the class of customers, the extent of the reputation, the trade channels, the existence of any connection in the course of trade, and several others. Of course, it need not be stated that it would not be that all such factors would exist in each and every case."

10. I have already indicated several of the distinguishing features in the case before the Bombay High Court, which influenced the Court in coming to the conclusion that there is likelihood of deception or confusion, in spite of the fact that the goods were totally different from one another. One additional factor which may also be noticed is that the petroleum products of Caltex India Limited, are advertised throughout India very widely, the company spending very huge amounts for advertising alone. Their sales in a year run into several crores of rupees. Therefore, that case cannot be equated with the case now under consideration. The goods of the appellants can have possibly only a limited market and limited class of purchasers, who are not likely to be deceived or confused, by the appearance of the stationery goods of the respondents under the trade mark "EFFICON". It is also to be noticed that the respondents are not seeking to use the same trade mark as that of the appellants, though phonetically there might be good deal of similarity between one mark and the other. "EFFICON", which

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1. A.I.R. 1969 Bom. 24.

is sought to be registered by the respondents is undoubtedly uninvented word as " ETHICON' itself is.

11. Under these circumstances, I agree with the conclusion of the Assistant Registrar that there is no likelihood of deception or confusion in registering the trade mark 'EFFICON' for the stationery goods of the respondent. The appeal fails and the same is accordingly dismissed.

12. I record my appreciation of the assistance rendered by V. Natarajan, *amicus curiae* for the respondent. There will be no order as to costs.

S.J. ——— *Appeal dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P.S. Kailasam, Officiating Cheif Justice, G. Ramanujam and V. Balasubramanyan, JJ.*

The Chief Controlling Revenue Authority, Board of Revenue, Madras .. *Petitioner**

v.

Jagadambal and V. Chinmayananda Reddiar .. *Respondents.*

(A) *Stamp Act (II of* 1899), *section* 2 (15) *and* (24)—*Agreement to take properties otherwise than with reference to devolution contemplated by will—Whether partition or settlement—Partition possible between co-owners not having absolute or equal rights.*

(B) *Transfer of Property Act (IV of* 1882), *section* 5—*Scope.*

Section 5 of the Transfer of Property Act, states that "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons. "Property", therefore, includes property in future, *i.e.*, the person with vested interest is also owner of the property along with the limited owner, who will also be an owner however limited her rights may be as between these two persons. They need not be absolute owners of the entire property or any portion of it. Partition is possible between two co-owners who may not have absolute or equal rights. Though section 5 of the Transfer of Property Act, relates to transfer *inter vivos* of property, including future interest, by a conveyance, it is equally applicable to wills also. In the instant case, it may be noted that the document in question was executed in settlement of disputes between the two parties. There is no difficulty in holding that this document was executed in settlement of the disputes between the two persons entitled to the same properties, who agreed to divide them amongst themselves in a particular manner.

[*Para.* 3.]

Case referred to the High Court by the Chief Controlling Revenue Authority, Board of Revenue, Madras, under section 57 (1) of the Indian Stamp Act, 1899, to answer the following point.

> "Whether the document No. 8 of 1970 of the Sub-Registrar's Office, Mannargudi, dated 15th December, 1969 executed by the first and the second respondents who have agreed to take the properties recited in the said document otherwise than with reference to the mode of devolution contemplated under the Will executed by Sreenivasa Reddiar, dated 2nd October, 1941, is a partition chargeable under Article 45 of Schedule I of the Indian Stamp Act, or a deed of settlement chargeable under Article 58-A of the Indian Stamp Act, or any other Article under the Act?"

Manivannan, the Additional Government Pleader No. II on behalf of Petitioner.

R. Srinivasan, for Respondents.

The Judgment of the Court was delivered by

Kailasam, Offg. CJ.—This case is referred under section 57 (1) of the Indian Stamp Act, by the Chief Controlling Revenue Authority, Board of Revenue, Madras. The first respondent, Jagadambal is the first wife of Srinivasa Reddiar. The second respondent, Chinmayananda Reddiar, is the sister's son of Srinivasa

*Referred Case No. 1 of 1975. 1st *April*, 1976.

Reddiar. Srinivasa Reddiar executed a Will on 2nd October, 1941 bequeathing the properties mentioned in the Will to the first respondent—first wife and stating that she should administer them and pay the debts incurred by him by selling the properties and that out of what remained after liquidating the debts, the properties should be enjoyed by the second respondent after the death of the first respondent. Srinivasa Reddiar died, and there were disputes as to their rights under the Will. There was a compromise, and the respondents executed a document on 5th December, 1969, by which the properties described in Schedule A were allotted to the share of the first respondent and the properties described in Schedule B were allotted to the second respondent who would be entitled to absolute rights over the properties so allotted to him and the first respondent would be entitled only to a life estate in the properties allotted to her. When the document was presented for registration before the Sub-Registrar, Mannargudi, as a partition deed chargeable to stamp duty under Article 45 of the I Schedule to the Indian Stamp Act, he impounded it and referred the matter to the District Registrar. The District Registrar construed the document as a settlement deed and not a partition deed and charged an additional stamp duty of Rs. 1,790 and a penalty of Rs. 5. The respondents filed an appeal to the Board of Revenue and the Board of Revenue confirmed the view of the District Registrar holding that the document was a settlement deed. Aggrieved by the order of the Board of Revenue, the respondents filed a writ petition before this Court, Writ Petition No. 3254 of 1971, and this Court directed the Board on 1st August, 1973 to refer the matter to this Court under section 57 (1) of the Indian Stamp Act. Thus, the Board of Revenue has referred the following point to this Court:

> "Whether the document No.8 of 1970. of the Sub-Registrar's Office Mannargudi, dated 5th December, 1969 executed by the first and the second respondents by which the first and second respondents have agreed to take the properties cited in the said document, otherwise than with reference to the mode of devolution contemplated under the will executed by Srinivasa Reddiar dated 2nd October, 1941, is a partition chargeable under Article 45 of Schedule I of Indian Stamp Act, or a deed of settlement chargeable under Article 58-A of the Indian Stamp Act, or any other Article under the Act."

2. The document in question, after reciting the terms of the Will, which provides that A and B schedule properties therein should be enjoyed by the first respondent for her lifetime and would vest with the second respondent after her lifetime, recites that there were disputes between the two respondents after the the death of Srinivasa Reddiar and the matter was settled by the well-wishers; and that the A Schedule properties were allotted to the first respondent to be enjoyed for her lifetime and would vest in the second respondent after her lifetime and the B Schedule properties were allotted absolutely to the second respondent.

3. It was contended on behalf of the Revenue that by this document the second respondent became entitled to B schedule properties immediately and thereby acquired more rights than otherwise given to him under the will. According to the Revenue, this amounted only to a settlement. That it cannot be a settlement is very clear. 'Settlement' is defined under section 2 (24) of the Stamp Act, as a non-testamentary disposition in writing of moveable or immovable property made (*a*) in consideration of marriage; (*b*) for the purpose of distributing property of the settlor among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him; or (*c*) for any religious or charitable purpose. It is obvious that the document was not executed for any of the purposes mentioned in section 2 (24) of the Act, and, therefore, cannot be a settlement. The question is whether it is an instrument of partition as defined under section 2 (15) as meaning any instrument whereby co-owners of any property divide or agree to divide such property in severalty. The argument advanced on behalf of the Revenue is that the second respondent was not entitled to any immediate right in the properties at the time when the

document was executed and, therefore, he cannot be classified as a co-owner. We are unable to accept this contention, for, section 5 of the Transfer of Property Act, states that 'transfer of property' means an act by which a living person conveys property, in present or in future, to one or more other living persons. 'Property', therefore, includes a property in future, *i.e.*, the person with a vested interest is also owner of the property along with the limited owner, who will also be an owner however limited her rights may be as between these two persons. They need not be absolute owners of the entire property or any portion of it. Partition is possible between two co-owners who may not have absolute or equal rights. Though section 5 of the Transfer of Property Act, relates to transfer *inter vivos* of property, including the future interest by a conveyance, it is equally applicable to wills also. In this case, it may be noted that the document in question was executed in settlement of disputes between the two parties. We do not see any difficulty in holding that this document was executed in settlement of the disputes between the two persons who are entitled to the same properties, who agreed to divide them amongst themselves in a particular manner. We are satisfied that the document in question is only a partition and we answer the referrence accordingly.

R.S. —— *Question answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail, J.*

Messrs. L. Mahadeviah and Sons and others ... *Appellants**

v.

State Bank of Mysore .. *Respondent*

Usurious Loans Act (Central Act X of 1918) as amended by Madras Act (VIII of 1937) section 3 (2) (b) proviso—Applicability —Presumption regarding excessive rate of interest —Interest at 11 per cent per annum with half-yearly rests in favour of bank not excessive in the circumstances of the case.

Where the appellants had not satisfied the Court that they were agriculturists coming within the proviso to the *Explanation* under section 3 (2) (*b*) of the Usurious Loans Act, they are not entitled to any relief with reference to the said proviso on the ground that they were agriculturists and consequently, the provision for payment of compound interest in the instant case *per se* shall not be presumed to be excessive. [*Para.* 3.]

No hard and fast rule can be laid down with reference to the rate of interest or with reference to the nature of interest, whether simple or compound, for the purpose of determining whether the rate of interest in a particular case is excessive or not. [*Para.* 5.]

Where there was no evidence of the ruling rate of interest in the market at the time the loan was taken or about the value of the property given as security therefor and the lender was a bank subject to certain regulations and control by the Reserve Bank of India and the promissory note referred to interest at five per cent over the Reserve Bank rate rising and falling, on the face of it, the rate of interest at 11 per cent. per annum with half-yearly rests, provided by the lower Court cannot be *prima facie* said to be excessive. [*Para.* 5]

Case referred to :—

Sri Nageswaraswami Bhakta Veluguri Sarayohayya Gupta v. *Gaddam Lazaras*, (1954) M.W.N. 684.

Appeal against the decree of the Court of the Subordinate Judge, Nilgiris at Ootacamund in Original Suit No. 69 of 1970.

N. Varadarajan, for Appellant.

C. S. Vidyasankar and *V. Narayanaswami*, for Respondent.

The Court delivered the following :

JUDGMENT :—The defendants in O.S.No. 69 of 1970 on the file of the Court of the Subordinate Judge of the Nilgiris at Ootacamund are the appellants herein and the appeal itself lies within a very narrow compass. The respondent instituted the suit on the foot of an equitable mortgage, for recovery of a sum of Rs. 2,00,000 with interest which amounted to Rs. 62,466.10 p. On 24th May, 1967, admittedly, the appellants executed a promissory note in favour of the respon-

* Appeal No. 37 of 1972. 18*th August*, 1975.

dent herein for the said sum of Rs.2,00,000 undertaking to pay interest " at 5 per cent over the Reserve Bank of India rate rising and falling with a minimum of 11 per cent per annum with quarterly rests." One of the points that appears to have been urged on behalf of the appellants before the trial Court was that the rate of interest was excessive. The trial Court considered this question and held that 11 per cent interest per annum with quarterly rests was excessive and 11 per cent interest per annum with half-yearly rests from 24th May, 1967, to the date of plaint would be reasonable and thereafter it provided for interest at 6 per cent per annum till realisation. The defendants in the suit have preferred this appeal questioning the award of this interest at 11 per cent with half-yearly rests. The appellants have claimed that they would be liable to pay only simple interest at 11 per cent per annum from 24th May, 1967, to 4th March, 1970. Consequently the only question that arises for consideration in this appeal is whether the award of interest at 11 per cent per annum with half-yearly rests by the trial Court can be said to be illegal from any point of view.

2. Mr. Varadarajan, the learned counsel for the appellants, first contended that under the proviso to section 3 (2) (b) of the Usurious Loans Act, 1918 (Central Act X of 1918) as amended by Madras Act VIII of 1937, in the case of loans to agriculturists, if compound interest is charged, the Court shall presume that the interest is excessive.

3. Admittedly, the appellants herein did not put forward any case in their written statement that they were agriculturists and consequently, under the Proviso to section 3 (2) (b) of the Central Act as amended by the Madras Act, the compound interest provided for in the promissory note, Exhibit A-1, should be presumed to be excessive. As a matter of fact, in the entirety of the written statement filed on behalf of the appellants, which consists of seventeen paragraphs, there is not a single paragraph in which the appellants have put forward the contention that the rate of interest provided for in Exhibit A-1, for which by way of collateral security an equitable mortgage was created, will attract the provisions of the Usurious Loans Act and therefore no issue was framed by the trial Court on this question. The only paragraph in the written statement, to which my attention was drawn in this behalf is paragraph 15, which states :—

> " In my view of the case this defendant is not liable to pay interest at 11 per cent per annum. The rate, method and manner of calculation of interest are not correct. The interest claimed is also excessive. The plaintiff is not entitled to claim compound interest."

Even in the other paragraphs of the written statement, there has not been a single statement to the effect that the appellants were agriculturists. The learned counsel merely relied on two sentences in the evidence of the fifth defendant as D.W. 1 who was the sole witness on behalf of the appellants herein, wherein he stated, " The first defendant is a firm registered under Partnership Act. It is an agricultural firm." From this alone it cannot be concluded that the appellants are agriculturists and fall within the scope of the proviso to section 3 (2) (b) of the Act. It is in view of this alone, the learned trial Judge has stated in paragraph 14 of his judgment that the learned counsel for the appellants (defendants before him) had not satisfied the Court that the appellants were agriculturists coming within the Proviso to the Explanation under section 3 (2) (b) of the Usurious Loans Act. Therefore, the appellants are not entitled to any relief with reference to the said Proviso on the ground that they are agriculturists and consequently, the provision for payment of compound interest *per se* shall not be presumed to be excessive.

4. Independent of this contention, the learned counsel also contended that the provision for 11 per cent interest with half-yearly rests must be held to be usurious under the provisions of the Usurious Loans Act, 1918, I am afraid that no such argument is available to the appellants herein, having regard to the circumstances of this case. Nowhere in the whole of the written statement was any case put forward by the appellants herein that the transaction between the parties was substantially unfair or the transaction was unconscionable. However, the learned coun-

sel for the appellants sought to invite my attention to several decisions of this Court holding that a particular rate of interest would be the proper rate having regard to the circumstances of the case. The provisions contained in the Usurious Loans Act, 1918, themselves indicate certain circumstances and factors which are to be taken into account for the purpose of coming to a conclusion whether the rate of interest in a particular case is excessive or not. The learned counsel for the appellants took me through the entire evidence of D.W. 1 and, in the whole of the evidence, there is not a single statement which has any bearing on the consideration of this question of the rate of interest with reference to the provisions of the Usurious Loans Act. This Court, in *Sri Nageswaraswami Bhakta Veluguri Sarayohayya Gupta* v. *Gadda Lazarus*[1], after referring to several decisions cited before it, pointed out :

> "I am afraid that the learned counsel on both sides are relying on rulings for a decision which must depend only on the facts of each case and cannot be covered by rulings. It might have been a very good thing if Parliament had enacted a law that 9 per cent simple interest per annum is the maximum rate which can be allowed on any loan, whether to an agriculturist or to a non-agriculturist as both the classes contain extremely poor and needy persons who will be hard hit by excessive interest. But as Parliament has not enacted such a law, the Court has to find in each case, on its facts, whether the interest contracted for its usurious or unconscionable or excessive and has to be reduced. There is no conflict between the two Bench rulings relied on by either side. It all depends on the facts. A Court has not, in my opinion, the same powers as the Legislature in this matter of fixing the reasonable interest. Nor has it got the powers of even a lender or creditor to fix a low rate of interest for a poor man out of pity. It has only the limited power of considering whether the interest contracted for between the parties is, in the circumstances of each case, usurious or unconscionable or excessive and, therefore, liable to be reduced. The rate allowed to stand by Courts will vary enermously in particular cases according to the particular facts. Thus if a pennyless man borrows Rs. 100 to make purchases in the neighbouring weekly shandy hoping to sell the articles so purchased at 50 per cent profit within 2 or 3 days, he cannot be said to pay an excessive rate of interest even if he agrees to pay simple interest at 15 per cent per annum as the sum borrowed is small and he will be paying that rate only for a few days, and no other person in the world would give him a loan at a lower rate of interest and the loan would be necessary for him to earn the 50 per cent profit he reasonably hopes to get. On the other hand, when there is good property given as security as in this case, any rate more than 12 per cent simple interest per annum must be held to be excessive. If the security afforded is worthless, such as a land which has got submerged or a land situated in enemy territory, interest higher than 12 per cent simple interest per annum may be justifiable when the borrower has no other property. It all depends upon the circumstances proved in each case."

5. This decision is in tune with several other decisions holding that no hard and fast rule can be laid down with reference to the rate of interest or with reference to the nature of interest, whether simple or compound, for the purpose of determining whether the rate of interest in a particular case is excessive or not. As far as the present case is concerned. D.W. 1 has not stated one word about the value of the property given as security for the loan. There is absolutely no evidence as to what was the ruling rate of interest in the market at the time when the loan was contracted in this case. Information about such factors will have a considerable bearing on the question whether the actual rate of interest contracted for by the parties is excessive or not. Further, the respondent herein was a Bank which is subject to certain regulations and control by the Reserve Bank of India and the reference to 'interest at five per cent over Reserve Bank of India rate rising and falling' in Exhibit A-1 itself is a clear indication in this behalf. On the face of it, the rate of interest at 11 per cent per annum

1. (1954) M.W.N. 684.

with half-yearly rests, provided for by the lower Court cannot be *prima facie* said to be excessive. As against this, the appellants had not placed any materials before the Court to show that such a provision for payment of interest was anyway excessive, requiring to be reduced by this Court.

6. Under these circumstances, there are no merits in the appeal and the same fails and is dismissed with costs.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail, J.*

Ranganatha Gounder and another .. *Appellants**

v.

Kuppuswami Naidu and others .. *Respondents.*

(A) *Hindu Minority and Guardianship Act (XXXII of 1956), sections 6, 8, 9 and 11—Alienation of minor's property by mother as guardian—Father alive on date of alienation—Alienation void—Powers of* de facto *guardian.*

(B) *Limitation Act (XXXVI of 1963)—Void alienation—Suit for recovery of possession and partition from alienee—Period of limitation twelve years.*

The provisions of the Hindu Minority and Guardianship Act provide that it is the father who is the natural guardian of his minor children and the mother will become the natural guardian only after the death of the father. The Act also provides that the natural guardian alone has got the power to deal with the immovable properties of the minors, and that too, with the permission of the Court. The further effect of this Act is that it has taken away the power of the *de facto* guardian to deal with the property of a Hindu minor, which power was available to a *de facto* guardian under the prior Hindu Law in certain stated circumstances. While the father is alive he alone is the natural guardian of the children and the mother could not be the natural guardian. If at all, the mother could be termed only as a *de facto* guardian if it is established that the minor children are living with the mother. Even then, under section 11 she has no competency to deal with the immovable properties of the minors, and therefore, the alienation effected by the mother in the instant case acting as the guardian of her minor children is totally void. Section 11 of the Act abrogates the power of the *de facto* guardian to deal with any property of a minor, whether it is an undivided interest in a joint family property or not. Unlike sections 6 and 9 which while referring to the 'minors property' expressly state "excluding his or her undivided interest in joint family property" and the words "other than the undivided interest referred to in section 12" respectively, section 11 does not exclude any such undivided interest of a minor in the joint family property from its scope and therefore the incompetency of a *de facto* guardian to deal with a minor's property extends to all the properties of a minor without any exception. [*Paras. 7 and* 8.]

Where an alienation is totally void and recovery of possession of the properties from the hands of the alienee and partition thereof is sought, the period of limitation is twelve years and not three years. [*Para.* 9.]

Case referred to:—

Rajalakshmi v. *Ramachandran*, (1966) 2 M.L.J. 420: I.L.R. (1967) 3 Mad. 778 : 79 L.W. 516 : A.I.R. 1967 Mad. 113.

Appeal against the decree of the Court of the Subordinate Judge of Tirupattur, dated 20th December, 1971 in Original Suit No. 4 of 1967.

K. Parasaran and *P. Narasimhan*, for Appellant.

T.R. Ramachandran and *T.R. Rajagopalan*, for Respondents.

The Court delivered the following

JUDGMENT.—The defendants 1 and 2 in O.S. No. 4 of 1967 on the file of the Court of the Subordinate Judge, Tirupattur, North Arcot District, are the appellants herein.

2. A simple point has been made elaborately complicated involving considerable

* Appeal No. 147 of 1972. 10*th September*, 1975.

waste of judicial time by the failure of the Court as well as of the parties to pay attention to the actual legal provision applicable to the case.

3. The suit was instituted by respondents 1 to 5 herein for partition and separate possession of their 5/7th share in the suit properties. The plaint also refers to the fact that the suit properties have been alienated under Exhibit A-2, dated 22nd August, 1957 in favour of the first defendant by the third defendant acting for herself and as guardian of the respondents 1 to 5 as well as respondents 7 and 8 herein. The suit has also been valued under section 37 (4) of the Tamil Nadu Court-fees and Suits Valuation Act, 1955, for cancellation of the said sale-deed itself, though the prayer in the suit is simply for partition and recovery of possession of the 5/7th share along with mesne profits from the appellants herein. The sixth respondent is the second wife of one Chinna Gopal Naidu, and respondnets 1 to 5,7 and 8 are the children of the sixth respondent through the said Chinna Gopal Naidu. The said Chinna Gopal Naidu had two sons by his first wife, Krishnaswami Naidu and Rajagopal Naidu. Exhibit A-1 dated 20th September, 1956 is styled as a release deed by the sixth respondent herein acting on her behalf and as the guardian of the minor children *viz.*, respondents 1 to 5, 7 and 8, releasing their interest in the B schedule properties in the place of the A schedule properties which they had taken. The said A schedule properties are the lands which were subsequently alienated by the sixth respondent on her behalf and as guardian of the respondents 1 to 5, 7 and 8 under Exhibit A-2, dated 23rd August, 1957 for a consideration of Rs. 5,000 in favour of the first appellant herein. The suit was instituted by respondents 1 to 5 putting forward the contention that the said alienation was not binding on them, and, therefore, they were entitled to claim 5/7th share in the suit properties from the appellants herein. The second appellant came to be impleaded as a party because he claimed to be in possession of the properties as a result of a partition arrangement entered into between the first appellant and the second appellant they being brothers in 1958. The 5/7th share was claimed on the basis that respondents 1 to 5, 7 and 8 alone were entitled to the entire properties, and the sixth respondent herself had no interest in the properties.

4. The second appellant herein filed a written statement, which was adopted by the first appellant. In the written statement, the second appellant contended that Exhibit A-2 sale-deed was valid and binding on the plaintiffs in the suit and the the said alienation was effected for the benefit of the minor children, *viz.*, for their maintenance as well as for the purpose of purchasing a house for them and for doing a business for their benefit. The second appellant also contended that subsequently, he had spent a considerable amount of money by way of improvements to the properties in question, and in any event, the appellants would be entitled to the payment of the value of improvements as well as the refund of the amount of consideration they paid under Exhibit A-2. Subsequently, an additional written statement was filed by the second defendant on 15th November, 1971 in which it was contended that the suit was barred by limitation.

5. On the basis of these pleadings, the following issues were settled for trial:

(1) Whether the sale deed dated 22nd August, 1957 is true, valid and binding on the plaintiffs?

(2) Whether the second defendant is entitled to improvements and if so, to what amount?

(3) Whether the plaintiffs are entitled to mesne profits and if so, from what date and at what rate?

The following additional issue was framed on 7th December, 1971:

(4) Whether the suit is barred by limitation?

6. The learned Subordinate Judge, by judgment and decree dated 20th December, 1971, decreed the suit. In view of the case set up by the appellant herein that the alienation under Exhibit A-2 was for the benefit of the minors and was justified by necessity, the learned Subordinate Judge elaborately went into the respective case of the parties and came to the con-

clusion that the said alienation was not for necessity and was not for the benefit of the minors. He also held that the appellants had not proved that they had spent any amount for improvements and, therefore, they were not entitled to the value of the improvements as claimed. With regard to the mesne profits, he fixed the future mesne profits at Rs. 357 per annum from the date of suit till date of delivery of possession of their share. On the question of limitation, he held that the suit was not barred by limitation. It is against this judgment and decree that the present appeal has been filed by the defendants 1 and 2 in the suit.

The following points arise for determination in this appeal:—

(1) Whether the sale deed Exhibit A-2 dated 22nd August, 1957 executed by the third defendant in the suit (sixth respondent herein) acting for herself and as guardian of her minor children, respondents 1 to 5, 7 and 8, is binding on the plaintiffs (respondents 1 to 5 herein)?

(2) Whether the suit is barred by limitation?

(3) Whether the appellants are entitled to the value of any improvements they claimed to have made?

7. As far as the first point is concerned, the position is very simple. As I pointed out already, the respondents obtained the suit properties under Exhibit A-1, the release deed executed by them in favour of Chinna Gopal Naidu and his two sons through his first wife, Krishnaswami Naidu and Rajagopal Naidu. It is these properties that have been sold under Exhibit A-2. Exhibit A-2 itself makes it clear that the sixth respondent purported to act as guardian of her minor children, in particular, respondents 1 to 5, while alienating the properties in question. The question for consideration is, whether she was competent to alienate the properties so as to make the alienation binding on the respondents 1 to 5 herein. It must be noticed that the alienation under Exhibit A-2, dated 22nd August, 1957 was effected after the Hindu Minority and Guardianship Act, 1956, came into force on 25th August, 1956. Consequently, it is the provisions of this Act that apply to the case in question. Under section 6 of that Act, the natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property) are, in the case of a boy or an unmarried girl the father, and after him, the mother. Therefore this provision makes it clear that it is the father, who is the natural guardian of the minors in the present case, and the mother will become the natural guardian only after the father, and not so long as the father is alive. Section 8 (1) of the Act states:

> "The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate."

Sub-section (2) of section 8 provides that the natural guardian shall not, without the previous permission of the Court, mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor, or lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority. Sub-section (3) of section 8 states:

> "Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him."

Sub-section (4) provides:

> "No Court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in case of necessity or for an evident advantage to the minor."

Sub-section (1) of section 9 provides:

> "A Hindu father entitled to act as the natural guardian of his minor legitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the monor's property (other than the un-

divided interest referred to in section 12) or in respect of both."

Section 11 provides :

"After the commencement of this Act, no person shall be entitled to dispose of, or deal with the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor."

These provisions, therefore, provide that it is the father who is the natural guardian of his minor children and the mother will become the natural guardian only after the death of the father. The Act also provides that it is only the natural guardian who has got the power to deal with the immovable properties of the minors, and that too, with the permission of the Court. The further effect of this Act is that it has taken away the power of any *de facto* guardian to deal with the property of a Hindu minor, which power was available to a *de facto* guardian under the prior Hindu Law in certain stated circumstances. As far as the present case is concerned, it was admitted that on the date of Exhibit A-2, the father Chinna Gopal Naidu was alive. Consequently he alone was the natural guardian of respondents 1 to 5, and the mother (sixth respondent) could not be the natural guardian. If at all, the mother could be termed only as a *de facto* guardian if it is established that the minor children were living only with the mother. Even if it is so established and the mother could be said to be the *de facto* guardian, under section 11 of the Act, she had no competency to deal with the immovable properties of the minors, and, therefore, the alienation effected by the mother, acting as the guardian of her minor children, under Exhibit A-2 is totally void. Hence, the question whether that alienation was for the benefit of the minors or justified by necessity does not arise at all. Consequently, my conclusion on the first point is that the alienation under Exhibit A-2 effected by the sixth respondent acting as the guardian of her minor children, is wholly void, and, therefore, is not binding on the minor children. This is also the view taken by this Court in *Rajalakshmi* v. *Ramachandran*[1]

8. The learned counsel for the appellants sought to advance an argument that the properties which the respondents acquired under Exhibuit A-1 were the joint family properties of Chinna Gopal Naidu and his children, and, therefore, with reference to the joint family properties, the father, even under section 6 of the Hindu Minority and Guardianship Act, 1956, cannot be said to be the natural guardian. In my opinion, this argument does not help the case of the appellants to any extent whatever. In the first place, there is absolutely nothing to show in Exhibit A-1 that the suit properties were treated as the joint family properties and they were retained as the joint family properties. I have already referred to the fact that Exhibit A-1 has been styled only as a release deed and has been executed by 6th respondent on her behalf and on behalf of her minor children and under that document they became the owners of the suit properties. Even if it is assumed that Exhibit A-1 is really a deed of partition and under that partition the ancestral properties of Chinna Gopal Naidu were partitioned, it passes one's comprehension as to how the 6th respondent, the wife of Chinna Gopal Naidu and the 5th and 8th respondents, their daughters would be entitled to have shares in joint family properties, as they were actually given in the present case. This too shows that the suit properties cannot be treated as joint family properties, and that too of the 6th respondent and her sons and daughters. Secondly, assuming that the suit properties were the joint family properties of the children of the sixth respondent herein through Chinna Gopal Naidu, still the sixth respondent has no power to alienate the said properties. Section 11 of the Act which I have already extracted abrogates the power of the *de facto* guardian to deal with any property of a minor, whether it is an undivided interest in a joint family property or not. Unlike sections 6 and 9, which while referring to the "minor's property" expressly state "excluding his or her undivided interest in joint family property" and "other than the undivided interest referred to in section 12", respectively, section 11 does not exclude any such undivided interest of a minor in the joint family property from its scope and therefore the incompetency of a

1. (1966) 2 M.L.J. 420 : I.L.R. (1967) 3 Mad. 718 : 79 L.W. 516 : A.I.R. 1967 Mad. 113.

de facto guardian to deal with a minor's property extends to all the properties of a minor without any exception. Therefore, this argument is not of any avail to the appellants herein.

9. The second point relates to the question of limitation. A point seems to have been urged before the trial Court that the fourth defendant in the suit, *viz*., seventh respondent herein, had attained majority and, he had not filed the suit within three years from the date of his attaining majority, and consequently, under sections 7 and 8 of the Limitation Act, 1963, the entire suit is barred by limitation. Even assuming that the seventh respondent herein had attained majority and had not filed the suit within the period of three years subsequent to the date of his attaining majority, still that fact would not in any way help the appellants herein. I have already referred to the fact that the alienation under Exhibit A-2 is totally void, and if it is so void, it is open to the respondents 1 to 5 herein, to ignore the alienation and to sue for partition and separate possession of their shares straightaway without seeking cancellation of that alienation. Under such circumstances, where the alienation is totally void and the respondents 1 to 5 herein are seeking recovery of possession of the properties from the hands of the alienee and partition thereof, the period of limitation applicable is twelve years, and not three years. In this case, Exhibit A-2 is dated 22nd August, 1957 and the suit has been instituted in 1967, *i.e.*, even before the expiry of the period of limitation prescribed therefor, and consequently, the question of reliance on section 7 or section 8 of the Limitation Act, 1963, does not arise. It appears that the argument was advanced on the basis of a misapprehension that the period of limitation available to the parties in the present case was only three years, and not twelve years. Therefore, my conclusion on the second point is that the suit is not barred by limitation.

10. As far as the third point is concerned, I am clearly of the opinion that the appellants are not entitled to any relief by way of improvements. I may straightway mention in this context that even before the suit was instituted, under Exhibit A-3, dated 22nd April, 1961, the seventh respondent herein on his behalf as well as on behalf of his minor brothers issued a notice to the appellants and to his mother, the sixth respondent, challenging the alienation and claiming share in the properties. Exhibit A-4, dated 26th May, 1961 is a reply notice sent by the counsel for the appellants herein to the said Exhibit A-3. In this reply notice, there was no whisper about any improvements effected by either the first appellant or the second appellant. The written statement was filed by the second appellant only and it was adopted by the first appellant. In this written statement, the second appellant claims to have spent only a sum of Rs. 7,800. According to him, he spent a huge cost of nearly Rs. 2,000 and more for deepening and broadening the well in Inam S. No. 32 and had also borrowed a sum of Rs. 1,750 on 15th October, 1961 by executing a promissory note in favour of one Papanoor Papanna Goundan for that purpose and the amount due on the said promissory note was still outstanding. He further stated in the written statement that in respect of Inam S. No. 33, the old well was deepened and broadened and an electric motor and pumpset were installed at a considerable cost. According to the second appellant, he and his wife have not only borrowed Rs. 3,000 on 3rd January, 1959 by executing a promissory note in favour of one K.C. Balaraman of Jalarpet for the above purpose, but had also taken a loan of Rs. 1,300 from the Government for purchasing a pumpset. The further case of the second appellant was that he had also dug a new well in S. No. 33 in or about the year 1964, and had also spent a sum of about Rs. 1,500 for the said purpose. Thus, the total amount representing the value of the improvements effected by the second appellant as claimed, was Rs. 7,800, made up of Rs. 2,000 for the well in Inam S. No. 32, Rs. 3,000 for the well in S.No. 33, Rs. 1,300 for a pumpset, and Rs. 1,500 for a new well.

11. In the course of the trial, this sum of Rs. 7,800 multiplied itself to Rs.15,500. This sum of Rs. 15,500 was said to be made up of Rs. 5,000 for reclamation of the lands, Rs. 2,000 for repairing the well in S.No. 33, another Rs. 2,000 for the said well in S.No. 33, Rs. 2,000 for digging a new well, Rs. 1,500 for installing a pump-

set and Rs. 3,000 for deepening and broadening the well in S.No. 32. Even though the total of these amounts would come to Rs. 15,500, still the second appellant claimed that he had spent a sum of Rs. 17,500. He himself admitted in the course of his evidence that he had not maintained any accounts whatever for the above expenses. According to the first appellant as D.W. 1, the total value of the improvements was Rs. 10,000. Apart from the fact in the reply notice Exhibit A-3 there was no whisper about any improvements having been effected in the lands and in the written statement only a sum of Rs. 7,800 was claimed and in the course of the trial a sum of Rs. 10,000 was claimed by P.W. 1, Rs. 15,500 (Rs. 17,500) has been claimed by D.W. 5 which itself will clearly show that the case of the appellants herein cannot be true. There are other factors which also will negative the case of the appellants. In the first place, in the written statement, there is no claim whatever that the appellants had spent any amount for reclaiming the lands and it is only for the first time in the course of the trial, the second appellant (D.W. 5) put forward the case that he spent Rs. 5,000 for reclaiming the lands in question. He admitted that even for that, he had no accounts to show that the said sum of Rs. 5,000 was spent for reclamation. Therefore, the claim of the appellants in this behalf is not true.

12. As far as the claim for having spent money for repairing the well in Inam S. No. 33 is concerned, it is the admitted case of the appellants themselves that notwithstanding the alleged amounts spent by them in repairing, the well was in disuse and the well could not be used without spending a further sum of Rs. 3,000. Therefore even on the date when the second appellant gave evidence, the well in S.No. 33 was not in use and therefore there is no question of the respondents being called upon to pay the value of the improvements in respect of the well in question.

13. As far as the well in S.No. 32 is concerned, I have alrady referred to the fact, that in the written statement he claimed to have spent only a sum of Rs. 2,000. But, in the course of the evidence, that sum of Rs. 2,000 got itself multiplied to Rs. 3,000. In support of the case that he spent a sum of Rs. 2,000 for deepening the well in S.No. 32, the second appellant claimed to have executed a promissory note for Rs. 2,000 under Exhibit B-4, dated 15th October, 1961 in favour of D.W. 4. D.W. 4, was examined for the purpose of proving the same. There are one or two circumstances which will make it clear that no reliance can be placed on Exhibit B-4 or the evidence of D.W. 4 and the case of the appellants based thereon. It is admitted that D.W. 4 is a distant relative of the appellants. Secondly, this amount is said to have been borrowed under a promissory note dated 15th October, 1961. I have already referred to the fact that the fourth defendant in the suit *viz.*, seventh respondent, had given notice under Exhibit A-3, dated 22nd April, 1961 and this improvement for the well in S.No. 32 is supposed to have been made within six months from the date of that notice. Even if such expense was incurred, in view of the fact that it was done after the notice, it cannot be said to be a *bona fide* improvement effected by the appellants herein. The third circumstance to be taken into account is that though this promissory note is dated 15th October, 1961 (which has been marked as Exhibit B-4), it was said to be outstanding even on the date when D.W. 4 gave evidence *viz.*, 22nd November, 1971. On the face of it, such a case cannot be accepted. Therefore, the appellants herein would not be entitled to any amount by way of the alleged improvements said to have been effected in respect of the well in Survey No. 32.

14. The next question is with regard to the new well said to have been constructed by the second appellant herein. In his written statement, he stated that the said new well was constructed in 1964. But in the course of the evidence, it was admitted that the said well was constructed after the suit in 1968, and, therefore, with reference to any amount alleged to have been spent for the digging up of the new well, the appellants herein would not be entitled to claim any amount from the respondents herein.

15. That leaves out the last question with regard to the value of the pumpset.

As the learned trial Judge himself rightly pointed out, the respondents 1 to 5 in their plaint had not claimed any share in the pumpset and it is certainly open to the appellants herein to remove the pumpset which they are alleged to have fixed up. Under these circumstances, the appellants fail on all the three points.

16. I may point out only one other matter in this behalf. Though respondents 1 to 5 claimed 5/7th share in the suit, the learned Subordinate Judge has held that the respondents 1 to 5 are entitled to 5/8th share only. The learned trial Judge held that under Exhibit A-1 it is not only the children of the sixth respondent, who were entitled to the properties, but the sixth respondent also was entitled to an interest in the properties, and, therefore, all the eight persons are entitled to one share each and the respondents 1 to 5 are entitled to 5/8th share. Even while granting a decree for 5/8th share in favour of the respondents 1 to 5, he has made it conditional upon the respondents 1 to 5 herein paying 5/8th of the consideration under Exhibit A-2. It is doubtful whether the appellants would be entitled to that amount at all. But, since the respondents 1 to 5 herein have not preferred any memorandum of cross-objections or cross-appeal, it is not necessary to consider this question further.

17. Under these circumstances, the appeal fails and it is dismissed with costs of the respondents 1 to 5.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

Santanavenugopalakrishnan and others .. *Appellants**

v.

K. V. Venugopal and others .. *Respondents.*

Hindu Law—Alienation of family property by father-manager—Legal necessity—Minor sons—Suit for partition—Alienations challenged on the ground of no legal necesssity—Burden on minors—Nature of proof.

The mere *ipse dixit* of the plaintiff as soon as he becomes a major basing his information on hearsay and gathering some witnesses who would parrot-like repeat what he wants them to say would not improve the position.

Antecedent debts have special significance. It is therefore essential that in such connection where alienations are made to pay antecedent debts recited in a registered and old document as existing debts of the family, the minor should be in a position to bring home to the Court that there was no occasion for the father-manager or any other manager of the joint family to involve himself in such entrepreneurship. For this purpose, he must be in a position to prove what would be the income from the joint family properties and that after meeting the generality of expenses connected with the family there could have been available surplus, the existence of which cannot prompt reasonable persons to borrow unnecessarily or to mortgage unnecessarily the family properties so as to ultimately burden them. It would be a practical impossibility for the alienees who are brought to the threshold of the Court on the facts adverted to by the minor challenging coparcener to prove that the consideration which passed under one or other alienation made by the father-manager was rightfully or properly utilised by their vendors. It would be unreasonable to expect such meticulous proof of appropriation and treatment

* Appeal No. 264 of 1969. 20*th November*, 1975.

of such consideration nearly 15 or 20 years after the date of such alienation.

[Para. 4.]

The challenges made by the minor in the matter of alienation or borrowings made by their elders including their father cannot lightly be accepted by Courts unless the facts in each of the cases do satisfy the norms laid down by the varius decisions.

Cases referred to:—

Masit-Ullah v. *Damodar Prasad*, 53 I.A. 204: 51 M.L.J. 792: 98 I.C. 1031: A.I.R. 1926 P.C. 105 at 108; *Jagannath* v. *Shri Nath*, 66 M.L.J. 321: 61 I.A. 150: A.I.R. 1934 P.C. 55; *Sant Baksh* v. *Lachiman Prasad*, A.I.R. 1946 Oudh 92; *Dhhar Amrit Lal Nagji* v. *Doshi Jayantilal Jethalal*, (1960) 3 S.C.R. 842: (1962) 1 S.C.J. 282: (1962) 1 An.W.R. (S.C.) 134: (1962) 1 M.L.J. (S.C.) 134: A.I.R. 1960 S.C. 964; *Radhakrishnadas* v. *Kaluram*, (1963) 1 S.C.R. 648: A.I.R. 1967 S.C. 574.

Appeal against the decree of the Court of the Subordinate Judge, (Additional) Erode, in O.S.No. 2 of 1964 (O. P. No. 114 of 1962).

N. Sivamani, for Appellants.

S. Somasundar, P.S. Srisailam and *C. Chinnaswami*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—Plaintiffs 1 to 5 are the sons of the first defendant and plaintiffs 6 to 8 are the sons of the second defendant. The first and the second defendants are the sons of one Vadamalai Pillai who, in this case has to be considered as the common ancestor. He died in 1926 leaving behind him his widow, Palani Ammal and his two sons, defendants 1 and 2 who were then minors. It is common ground that until the first and the second defendants became majors in course of time, Palani Ammal was managing the family properties. On the evidence on record, it is seen that Palani Ammal herself had to borrow, either by mortgaging properties or otherwise, for the maintenance and preservation of the family properties. After the first and the second defendants became majors and took over the family properties and administered them, they had to, in turn, incur expenses not only in connection with the family but also for purposes connected thereto. In the course of such administration, both defendants 1 and 2 had to borrow on mortgages, promissory notes, usufructuary mortgages, etc. Every precaution, however, was taken in the course of such borrowings by each of the first and the second defendants to take in their respective minor children who are plaintiffs in the action as parties to such borrowings. Necessarily either the first defendant or the second defendant represented such minors and were acting for them as well. Until 1953, the first and the second defendants were joint in possession, food, etc. In a partition action O.S. No. 188 of 1953, the brothers partitioned the family properties and after effecting such a partition, on 16th April, 1956 each of the branches, represented by the first and the second defendants, was administering and in charge of the properties so taken over by them in such a partition as above. After such a partition, the first defendant represented for himself and his minor sons and the second defendant for himself and his branch of minor sons, did create further encumbrances or sales of the properties taken over by them in the partition. After such alienations were made by the first and the second defendants, either at the time when they were joint or after they disrupted themselves (during the period commencing from January, 1947 to February, 1958) the plaintiffs have come to Court in 1964 seeking for a partition of the joint family properties and challenging the various alienations made by defendants 1 and 2 at the time when they were joint or after they severed their joint status. Plaintiffs 1 and 2 were majors on the date of suit. Plaintiffs 3 to 8 were minors on the date of action. Later, plaintiffs 3, 4 and 6 were declared as majors in the course of the trial. The main challenge against the manner and mode of administration of the family properties by defendants 1 and 2 as made by the plaintiffs as a whole, appears to be that defendants 1 and 2 were abdicted to evil habits such as drinking and gambling and womanising and that the alienations including the borrowals which they made from time to time and which result-

ed in a large slice of the joint family properties being alienated for the purpose of discharging such debts, are not binding upon the share of the minor coparceners in the family. According to them, the income from the joint family properties was sufficient not only for the general maintenance of the members of the family but also would yield a surplus therein which surplus by itself is sufficient indicia which would prevent the manager of the joint family from either borrowing or alienating any of the family properties. They would attack the various alienations made between 1947 and 1958 as sales or mortgages or borrowings made by them without legal necessity and certainly, not for the benefit of the minor members of the family. In particular, the plaintiffs would attack the alienations of *A* to *G* Schedule properties as not for consideration, not for family benefit and not even for legal necessity. The plaintiffs, no doubt, set out in the plaint, the various details regarding the alienations challenged or complained of and would, therefore, seek for a partition of the family properties ignoring such alienations and for a division of the available properties amongst them as coparceners of the family as a whole. They have impleaded the alienees as defendants 3 to 13. After the death of the 7th defendant, defendants 14 to 18 have been added as his legal representatives. The plaintiffs, therefore, pray for a decree to set aside all the alienations in relation to the properties comprised in Schedules *A* to *G* and for a division of such properties in accordance with law and for an allotment of their legitimate share therein. Defendants 1 and 2 remained *ex parte*. Most of the alienees have filed independent written statements and their main contention is that the sale deeds in their favour are for discharge of antecedent debts and that the properties have been sold for adequate consideration and there was at all times, a necessity for such alienations. They have referred to the fact that even during the lifetime of Vadamalai Pillai, the inadequacy of the income was felt as seen from the fact that the common ancestor himself had to mortgage the properties on several occasions. Such mortgages effected by the common ancestor were discharged by his widow, Palani Ammal, after his death when defendants 1 and 2 were minors. Here again, Palani Ammal had to borrow by mortgaging certain properties in favour of Land Mortgage Banks in order to discharge the already existing and binding debts of the family. Their case is that Palani Ammal included defendants 1 and 2 also at or about the time when she executed the mortgages over the family properties. Therefore, they would say that the family, at all times, though possessed of considerable landed property, did not have such sufficient surplus income and this was the primary reason for her borrowings and ultimately for the sale of a large slice of the family properties. They would say that the first and the second plaintiffs having come to Court three years beyond the date when they became majors, they cannot attack the alienations made by their respective parents and in so far as the action relates to the first and the second plaintiffs, the defendants' case is that it is barred by limitation. They have taken the other usual pleas which we shall consider if it becomes necessary in the course of our judgment. On the above relevant pleas, the following issues were framed :

(1) Whether the alienations made by defendants 1 and 2 in favour of each of the defendants 3, 7, 8, 11 and 12 are true, valid and binding on the plaintiffs and whether they are tainted with illegality and immorality?

(2) Is the suit in time?

(3) Is the suit bad for partial partition?

(4) Whether plaintiffs are entitled to declaration and partition?

(5) To what reliefs are plaintiffs entitled?

Additional issues framed on 30th October 1964:—

(6) Whether the debts quoted in the sale-deed dated 12th December, 1954 executed by defendants 1 and 2 in favour of 9th defendant's father were incurred by defendants 1 and 2 for immoral and illegal purposes?

(7) If the answer to additional issue (6) is in the affirmative whether the 9th defendant's father was aware that the earlier debts quoted in the sale-deed, dated

12th December, 1964 were incurred for such immoral and illegal purposes ?

(8) Whether the 9th defendant's father has remodelled and rebuilt the house at a cost of Rs. 10,000; if so, whether plaintiffs are bound to recompense 9th defendant by payment of a sum of Rs. 14,000 in equity ?

(9) Whether the first plaintiff and the second plaintiff have not completed 18 years of age, 3 years, prior to the date of suit and the suit is not barred by limitation ?

(10) Whether the suit is not barred by limitation as against all the plaintiffs under sections 6 and 7 of the Limitation Act of 1908 as regards all the sales executed by defendants 1 and 2 and the sale dated 12th December, 1954 in favour of the 9th defendant ?

(11) Whether the plaintiffs or any of them are entitled to mesne profits and if so, at what rate ?

The following additional issues were framed:—

(12) Whether the sale deed executed by defendants 1 and 2 and plaintiffs 1 to 3 with respect to B schedule properties was for family necessity and for discharging antecedent debts ?

(13) Whether the plaintiffs are entitled to set aside the alienations made by their fathers and claim partition and if so, to what extent ?

The following additional issue was framed on 22nd November, 1967.

(14) Whether the suit is bad for non-joinder and mis-joinder of parties ?

2. The learned trial judge came to the conclusion that the alienations of properties described in schedules A to G made by the first and the second defendants are binding on the minor plaintiffs excepting for one item of property comprised in the B schedule which the lower Court upheld as an alienation which does not bind the minor coparceners. It held that the rest of the challenges made by the plaintiffs are unsustainable. In so far as the first and the second plaintiffs are concerned, the suit was dismissed as the cause of action is stated to have been barred as against them. In the result, the lower Court decreed the suit for a partition and separate possession of the third plaintiff's two shares out of the 24 shares in the plaint B schedule properties as against defendants 5 and 6 and dismissed the suit as against the other defendants and other plaint schedule properties. He relegated the ususal enquiry as to mesne profits regarding the accepted claims of the third plaintiff to independent proceedings. It is as against this, the present appeal has been filed.

3. We may at once, state that in this appeal defendants 7 and 8 who purchased the C schedule properties, the 10th defendant who purchased the E schedule properties and the 12th defendant who purchased the G schedule properties are the only contesting respondents. Mr. Sivamani, repeating his contentions raised before the trial Court, would urge that the alienations made by the first and the second defendants either at the time when they were joint or at a time when they severed their joint status, would not bind the minor coparceners of each of the family for the reason that there was no occasion or necessity for them either to borrow or to alienate parcels of joint family lands on the ground of necessity or benefit to such minor coparceners. He would take us through the evidence oral and documentary relating to each of the alienations comprised in schedules A to G and would urge that the evidence on record would not justify the conclusions of the trial Court. According to him, P.Ws. who have been examined on the side of the plaintiffs satisfactorily spoke about the available surplus income of the family and the subject if viewed in this context would not justify either the borrowing or much less, the alienations of the joint family properties by one or the other of the brothers who were managing the family properties till the minors came to Court. Contending contra, learned counsel for the contesting respondents would say that ever since the ancestor's time, there is proof that the family was borrowing, from time to time, either for sustenance or for preservation of the family properties and it was this which is reflected in the conduct of the first and the second defendants when they

took over the family properties as managers thereof. They would harp upon the fact that excepting for the *ipse dixit* of P.W. 1 and the others who could casually refer to the alleged fast life led by defendants 1 and 2, there is no acceptable material to show that the brothers incurred such debts for immoral purposes such as gambling and womanising.

4. Before we deal with each of the schedules and the facts as found on the record in relation thereto and the manner and the reason for the alienations of such properties by one or the other or both of the first and the second defendants, it is convenient to make certain general observations regarding such subject-matters which have been coming and are likely to come often in Courts of law. When a minor institutes an action challenging the alienations made by his father or his ancestors on the ground that the debts were *avyavaharika* in nature and that there was no legal necessity which would compel the manager, though he may be a father, to sell or alienate otherwise the properties it is for him to establish at least reasonably, that the circumstances and the position of the family were such that no occasion could have arisen for such a borrowing and that there was no necessity, at all, to alienate the properties at any particular or material point of time. The mere *ipse dixit* of the plaintiff, as soon as he becomes a major basing his information on hearsay and gathering some witnesses who would parrot-like repeat what he wants them to say would not improve the position. Antecedent debt has a special signification. If the debts are incurred for paying off debts already in existence, then it will be normally understood as an occasion in which an antecedent debt is being discharged. It is therefore, essential that in such connections wherein alienations are made so as to pay off antecedent debts in the sense of debts which are recited in a registered and old document as existing debts of the family, the minor should be in a position to bring home to the Court that there was no occasion or there could have been no occasion for the father-manager or any other manager of the joint family to involve himself in such entrepreneurship. For this purpose, he must be in a position to prove what would be the income from the joint family properties and after meeting the generality of expenses connected with the family, there could have been available surplus the existence of which cannot prompt a respectable person to borrow unnecessarily or to mortgage unnecessarily the family properties so as to ultimately burden them. The Supreme Court has laid down in uncanny terms that proof of such available surplus or a reasonable inference or acceptable material that there is a possibility of such available surplus, should be established so as to compel Courts of law to set aside an ancient or an old alienation on the ground that the recitals in the document which created such alienations have to be ignored lightly and contemporaneously brushed aside as not binding on the challenging minor coparceners. Further in cases like this, it would be a practical impossibility for the alienee who is brought to the threshold of the Court on the facts adverted by the minor challenging coparcener to prove that the consideration which passed under one or other alienations made by the father-manager or the manager was rightfully or properly utilised by their vendors. It would be unreasonable to expect such meticulous proof of appropriation and treatment of such consideration nearly 15 or 20 years after the date of such alienation.

5. We may also in passing refer to the decided cases making another general observation in cases like the one under consideration. It is the common feature in such cases that the father who is responsible for the litigation, who, though is living with the minor, keeps himself safely outside the witness-box. He can easily be presumed to be a person who is encouraging this litigation as a *sutradari*. It would not be unreasonable to presume that the hand of the father is always there in this litigation and he just brings into the witness box his brother's sons, minor children and others so as to gamble in litigation, by challenging his own alienations through them. It is this conduct of the parents which is condemned in the following lines in *Masit-Ullah* v. *Damodar Prasad*[1]. The learned Law Lords state that:

1. 53 I.A. 204 : 51 M.L.J. 792 : 98 I.C. 1031 = A.I.R. 1926 P.C. 105 at 108.

"The only sum that was left unaccounted for was Rs. 2,000 odd, as found by the Subordinate Judge. Janki Prasad, the plaintiff's father, admittedly received the whole consideration, and was the man who used the largest part of the money for the discharge, of the ancestral debts. He could have told in his evidence how the sum of Rs. 2,000 was applied. There is no evidence that it was used for immoral or unauthorised purposes. His testimony was therefore most material in the case............ ....Efforts were made to get him into the witness box, but he studiously avoided appearing in Court."

6. We shall now state the general principles which apply under such circumstances as was spoken to by the Privy Council and the other decision of the Supreme Court as well. In *Jagannath* v. *Shri Nath*[1] an old father alienated certain family properties and the sale deed was attested by the eldest members of the family. In a suit brought by the minors challenging such alienations, the Privy Council said that the attestors who were the eldest members of the family and who were intimately connected with it were in a better position than anyone else to say whether the money was applied for the necessary purposes of the family. They had allowed their children to figure as plaintiffs and got themselves impleaded as defendants. The suit was a collusive suit and the conduct of the elders afforded ample corroboration of the other evidence that the same was effected for necessary family purposes."

7. A Division Bench of the Oudh High Court in *Sant Baksh* v. *Lachhman Prasad*[2], observed that:

"Where the father executes a sale-deed by which he alienates joint family property to satisfy his previous liabilities and his son, on attaining majority, files a suit to set aside the sale deed on the ground that it was executed without any legal necessity impleading the father as defendant and the father does not come forward to give evidence whether all or any of the debts borrowed by him were not for legal necessity, it must be held that the suit is a collusive suit filed at the instance of the father and the failure of the father to come into the witness box and to state the real facts raises a *presumption* against the plaintiff that the money must have been needed for legal necessity."

(The italics is ours.)

8. Finally, the Supreme Court in *Dhhar Amrit Lal Nagji* v. *Doshi Jayantilal Jethalal*[1] stated that:

"Where ancestral property has been alienated either under a conveyance executed by the father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, the sons who challenge the allegation have to prove not only that the antecedent debts were immoral but also that the purchasers had notice that they were so tainted. In this respect no valid distinction can be made between mortgage and a purchase and the above principle will apply to a mortgage created by the father":

9. Again the Supreme Court in *Radhakrishnadas* v. *Kaluram*[2], stated that:

"Where an alienation, by way of sale of the family property made by a Hindu father is challenged by his sons on the ground of want of legal necessity then it is now well established that what the alienee is required to establish his legal necessity for the transaction and that it is not necessary for him to show that every bit of the consideration which he advanced was actually applied for meeting family necessity. The reason is that the alienee can rarely have the means of controlling and directing the actual application of the money paid or advanced by him unless he enters into the management himself."

10. It is, therefore, fairly clear that the challenges made by a minor in the matter of alienation or borrowings made by their elders including their father, cannot

1. 66 M.L.J. 321 : 61 I.A. 150: A.I.R. 1934 P.C. 55.
2. A.I.R. 1946 Oudh. 92.

1. (1960) 3 S.C.R. 842 : (1962) 1 S.C.J. 282: (1962) 1 An.W.R. (S.C.) 134 : (1962) 1 M.L.J. (S.C.) 134: A.I.R. 1960 S.C. 964.
2. (1963) 1 S.C.R. 648 : A.I.R. 1967 S.C. 574.

lightly be accepted by Courts unless the facts in each of those cases do satisfy the norms laid down by the various decisions cited above.

11. In the light of the above, it is for consideration, in the instant case, whether the minors have proved that the debts challenged by them or the alienations questioned were in connection with antecedent debts which were immoral and whether the purchasers had notice of the inherent *avyavaharika* nature of such debts.

12. Mr. Sivamani was not able to place before us any evidence about the income from the joint family properties. P.W. 1 is the first plaintiff, He was 26 years on 4th November, 1966 when he was examined in Court and he must have been born in or about 1940. But he is chauvinistic enough to speak about the death of his grandmother 10 years ago and about the debts of his grandfather 40 years ago and asserts that the annual income from the properties before the alienations, the first of which was in 1947 about Rs. 25,000 per annum. He would, candidly, admit that his grandmother told him about his father and uncle keeping concubines. He says that he heard that his father used to drink and was living with women in what is called "Pakku Thoppu". He is, evidently very sore that his father did not conduct the marriages of any of them during the relevant period. He would estimate that the debts quoted in the various sale deeds challenged by the plaintiffs were not for family necessity but he would not whisper in the witness box that such sales are not supported by consideration. Excepting for a bare statement in chief examination that the income would be about Rs. 25,000 per annum, he did not substantiate the same by producing any document or any other relevant material so as to prompt the Court to accept the same. P.W. 2 is the Drill Master. In chief examination itself, he would say that he was not sure as to the income which the properties yielded. But, according to him the annual income by way of rent 25 years back from the crops would be about Rs. 5,000 and from the trees in the various topes was about Rs. 8,000. He is not sure as to who were the lessees and he does not know, personally, as to the income from the suit properties which were under the cultivation of the first defendant or his lessees. He would say that a day before he was examined he went to his lands and that the suit lands are visible from his lands but he did not note the trees as they were two furlongs away. We are referring to this part of his evidence, at this stage, only for the purpose of showing that P.W.2 who is, admittedly, interested in the family has been brought down by the plaintiffs to assert that the income was about Rs. 13,000 per annum. P.W. 3 was invited to speak for a special purpose which we shall advert to later. He has been brought in for the purpose of saying that no consideration passed under Exhibit B-79. He does not speak to the income of the family properties as such nor does he corroborate either P.W. 1 or P.W. 2 in that regard. Thus, in the instant case, we have no evidence, at all about the income. It follows, therefore, that there is no acceptable material regarding the existence of available surplus which alone, possibly, would raise the presumption that there could have been and there was, no occasion for the manager of such joint family having such available surplus income to borrow or to mortgage or to sell the family properties. Exhibits B-4 to B-7 though of course, were of the year 1924, give a slight indication as to what, possibly, could have been the income from the family properties. It was only Rs. 1,075 per year. Having regard to the meagre income, Vadamalai himself was mortgaging properties and after his death, Palani Ammal continued the process and she had to borrow, presumably, to preserve the properties or to maintain the family. Though these pieces of evidence are not conclusive on the nature or quantum of the income, yet, they provide ample food for thought that the plaintiffs' exaggerated estimate of the income as Rs. 25,000 per annum, is not based on any proved data or hypothesis whatsoever.

13. We, therefore, start with the background that the family did not have any surplus income, at all. Next, we shall consider whether there is any evidence that either the first or the second defendants were, at all times, or in any event, at all material times, engaged in immoral or illegal activities. We have, already, seen that P. W. 1

heard about the first or the second defendant keeping concubines only from his grandmother who died 10 years ago when he could have been 16 years of age. We cannot expect that, in a family which claims to be so opulent and rich, the grandmother would discuss about the concubinage and the ways of living of his father with a teen-ager who is none else than her own grandson. Apart from this, P.W. 1 is unable to bring home the alleged evil habits of his father or his uncle. P.W. 2 does not improve the position any further. In a casual manner, he would say that the first defendant used to drink, gamble with cards and keep women. Excepting for this, he does not speak to the character or the alleged illegal activities of either the first or the second defendants any more when he was in the witness box. P.W. 3, who was specially brought for the occasion, in connection with A schedule properties, does not refer to the bad habits of the brothers, at all. In such a conspectus which touches upon the conduct and character of the first and the second defendants, it would be hazardous for us to risk the conclusion that the defendants 1 and 2 whenever and wherever they incurred debts on their behalf and on behalf of minor plaintiffs, they did so because they wanted to satiate their own thirst for lust and all such debts were for immoral, illegal and *avyavaharika* purposes.

14. We shall now deal with each of the schedules which relate to sales effected by one or the other or both the first and the second defendants. The first sale was under Exhibit B-75 dated 24th January, 1947. That was a sale of about 2.92 acres of wet land which was very near to Kalingarayan Channel for a sum and consideration of Rs. 15,900. After it was purchased under Exhibit B-75 the property devolved upon defendants 3 and 4 who, in turn, sold the western portion thereof under Exhibit B-74, to one Chinnammal who in turn, sold the property to the 13th defendant under Exhibit B-73. The 13th defendant, who purchased a portion of the property comprised in schedule A has been examined as D.W. 12. He would say that he purchased a portion of the A schedule property *viz.*, 1-46 cents of wet land for Rs. 9,000 and would also speak to the fact that the first defendant or the second defendant did not keep concubines and they were having good conduct. In cross-examination, it was brought out that he did not obtain encumbrance certificate and that the third defendant was in possession of the original title deeds. It is significant that this witness was not asked about the want of consideration or about the absence of his *bona fides* when he purchased the property after inspecting the original title deeds which were with the third defendant.

15. The consideration in Exhibit B-75, which is the original sale deed with which we are concerned, is made up as follows: A sum of Rs. 2,445 was paid off under Exhibit B-76 towards the subsisting mortgage and a sum of Rs. 5,000 was paid off under the promissory note exhibited as Exhibit B-79 and there were recitals in the said sale deed to the effect that three other promissory notes, dated 11th October, 1946, 15th October, 1946 and 5th November, 1946 were discharged under them and that only a sum of Rs. 826 was taken as cash consideration by defendants 1 and 2. We have already referred to the fact that the first and the second defendants discretely avoided the box. When P.W. 3 was in the witness box, he tried to make out a case that the promissory note Exhibit B-79 was not supported by consideration. The brother of P.W. 3 one Arulsami lent the amount under Exhibit B-79. P.W. 3 would swear that he and his brother were doing business in Erode from 1942 to 1946 in *javuli* and that they had account books and that all the transactions will be entered in the accounts. When he was asked about the account books he would say that they were with his brother and he would not be in a position to produce the same. Though he attested Exhibit B-79 he would have it that even the endorsement, Exhibit B-80, was written on the same date and time on which the promissory note Exhibit B-79 was written. We have already seen that Exhibit B-79 is dated 5th November, 1946. After having stated that Exhibits B-79 and B-80 were written at the same time and in the same place, he would say that Exhibit B-80 was written on 25th January, 1947 as mentioned therein. This witness has, therefore, no respect for truth. He would also claim that Exhibit B-79 was antedated. Apparently, he has fallen out with his brother who is stated to be in

jail and he was very handy for the plaintiffs as he was prepared to help them to the extent he can by saying that no consideration passed under the promissory note, Exhibit B-79. We disbelieve P.W. 3. In the absence of any other evidence which will give us at least the *prima facie* impression that the recitals in a document which is nearly 22 years old were falsely drawn into the instrument at that time, we are unable to accept the plaintiff's contention that the recitals therein ought not to be taken at their face value. If, therefore, Exhibit B-75 is fully supported by consideration and the debts recited therein were antecedent debts,

> —"Antecedent debt" means antecedent in fact as well as in time, that is to say, that the debt must be truly independent of and not part of the transaction impeached. To validate an alienation so as to bind the son, there must also be an antecedent debt. Generally there is no question of legal necessity in such a case." (*Vide* Mulla Hindu Law, 14th Edition, page 375.)—

there is no question of legal necessity in such a case.

16. The challenge against the alienations evidenced by Exhibit B-75 and in relation to the A schedule properties, therefore, fails.

17. We shall now take up schedule B properties. The plaintiffs have succeeded in the lower Court in so far as their challenge against this alienation is concerned. But the learned judge would not give any relief to the first and the second plaintiffs on the ground that they came to Court 3 years after they became majors and that, therefore, they cannot, under the law of limitation, personally attack the alienations made by the first and the second defendants. There cannot be any further probe into this finding which, in our view, has been correctly rendered by the Court below. Though Mr. Sivamani lightly touched upon it, he could not pursue it further.

18. We shall now take up the alienations relating to C schedule properties. Both the defendants 1 and 2 for themselves and on behalf of their minor children, *viz.*, plaintiffs 1 to 8, sold the properties comprised in the C schedule under Exhibit B-14 dated 24th June, 1953, in favour of the 7th and the 8th defendants. The recitals in the deed touching upon the consideration of the borrowing as well, may be summarised thus : A portion of the consideration went to discharge a prior mortgage under Exhibit B-9 dated 12th November, 1947. The said mortgage itself was for purposes of clearing the earlier debts incurred by the managers of the family under Exhibits B-10, B-11 and B-12. The second item of consideration was for discharging an usufructuary mortgage exhibited as Exhibit B-15 dated 27th May, 1944. The mortgage itself was for a sum of Rs. 7,500 and the occasion for the execution of the mortgage was to discharge, once again, earlier debts, under Exhibits B-1, B-19 and B-20. The third item relating to the consideration for the alienation in question was to discharge a registered mortgage executed by the first defendant for himself and his sons under Exhibit B-21 dated 29th June, 1947. Here again, the mortgage was effected for the purpose of discharging earlier debts. The fourth item to make up the consideration for the alienation was to pay off the promissory note debt evidenced by Exhibit B-24 dated 1st July, 1952. This promissory note was executed by both the first and the second defendants. The fifth and the sixth items of consideration related to the payment of the decree debts. The said decrees were obtained against the first or the second defendants in O.S. No. 730/51, District Munsif Court, Erode O.S. No. 41 of 1962, District Munsif Court, Erode and O.S. Nos. 21/52 and 698/52 in the same Court. After paying off the above debts which were anterior in point of time to the execution of the sale deed, Exhibit B-14, only a sum of Rs. 783/12/0 was received in cash and even here, the precaution was taken that it was received in order to meet certain family and agricultural expenses. It is thus seen that the several recitals in the sale deed, Exhibit B-14, which make up the consideration of Rs. 32,000, are either for payment of debts incurred by the manager prior to the date of sale or for the payment of decree debts which were obviously binding on them as well as the family. We have already prefaced by saying that at no point of time was there any query by the plaintiffs that the alienations are not supported

by consideration. But their main attack was that the debts were not incurred for *avyavaharika* purposes. They have miserably failed to establish that any of the debts in so far as the present alienation is concerned, was ever tainted in the manner suggested. We, therefore, uphold the alienation made under Exhibit B-14 and also confirm the finding of the Court below as regards Schedule G properties.

19. We now come to Schedule D properties which were alienated under Exhibit B-70 for a sum of Rs. 4,000 in favour of the 9th defendant's father. In connection with this transaction D.W. 9, who is the scribe of the document, has been examined. He in chief examination, would say that the first and the second defendants who are the executants of the said deed, got the money for family expenses. He would, also speak to the fact that their mother, Palani Ammal, was alive on the date of the execution of the said document. This was to clear off an earlier usufructuary mortgage in favour of one Vedavalli. In cross-examination, nothing significant has been brought out. He asserted that he wrote the mortgage deed himself and that the monies were borrowed for the benefit of the family in that, at the time, the residential house was in a bad state of repair. It is unnecessary for us to repeat at every stage, that excepting for a bare suggestion in the pleadings as well as in the witness box, the plaintiffs' witnesses could not establish to the satisfaction of the Court that the debts and the consequential alienations by the first and the second defendants ought to be set aside or ignored on the ground that such debts were incurred for immoral purposes. In the absence of an attack on the ground that there was no consideration for the sale and as the recitals are contained in rather old documents, we are unable to lightly brush aside its contents and truthfulness. One general argument urged by Sivamani is that though the document contained recitals regarding discharge of mortgages under which defendants 1 and 2 purport to have borrowed monies, from time to time, those promissory notes were not forthcoming. In some cases, at any rate, those promissory notes were filed and exhibited. But the non-production of such promissory notes in some cases by themselves would not create the impression that the debts themselves were fictitious or that they were borrowed for immoral or illegal purposes. We therefore, accept the finding of the Court below that the plaintiffs have not proved that the alienation of the D Schedule properties under Exhibit B-70 is not for the benefit of the family or for legal necessity.

20. The E schedule properties were sold under Exhibit B-71. This sale was, to pay off the usufructuary mortgage under Exhibit B-72. The document recites the receipt of the balance of cash consideration. D.W. 11, the husband of the alienee, speaks to this. Nothing has been stated against this witness. The plaintiffs, therefore, have not established that the alienation of the E Schedule properties was in any manner, improper.

21. We now come to F schedule properties. These properties were sold under Exhibit B-38 dated 6th May, 1956 by both the first and the second defendants. The sale was in favour of the 11th defendant who examined himself as D.W. 3 and he also examined one of the attestors to the said document as D.W. 4. There were 17 items recited in the body of the sale deed, Exhibit B-38, which items disclosed that there were debts anterior in point of time to the present sale and that the sale itself was effected in order to pay off and discharge those 17 live debts incurred by the then managers of the family. Exhibits B-39 to B-53 are the Exhibits which intrinsically establish that the consideration for the sale under Exhibit B-38 went for discharge of several prior debts incurred by the managers. The debts are in the nature of mortgages or evidenced by promissory notes. Several of the promissory notes and the endorsements made thereon were exhibited. But some of the promissory notes though recited in the sale deed have not been brought into record. Here again, the general comment is repeated. But, as we said, Exhibit B-38, is a sale which is nearly 18 years before this date and about 6 years before the action itself. In such cases, as the Supreme Court has stated, it is not for the alienee to see to the meticulous disbursement of the consideration paid by him to the vendors who are acting as managers of joint family, but to be generally satisfied about the integrity of such vendors in the

matter of clearance and discharge of such debts. D.W. 3 who proved the payment of consideration says that the sale negotiations took place for six months and there were other offers for this land as a whole and that he paid a fair price for the same and that the first and the second defendants were living jointly with as many as 25 members in the family at the time of sale and he denied that the first and the second defendants were leading a fast life and that the recitals in Exhibit B-38 show what were all the debts incurred by them and which were discharged from the sale consideration. He proved the Exhibits B-39 to B-53 and when he was cross-examined, no question was put to him that there was a failure of consideration nor was there any suggestion that the recitals in Exhibit B-38 are incorrect and have been invented for purposes of enabling the first and the second defendants to indiscriminately borrow so as to cause wrongful loss to the family properties. Here again the monotonous challenge made by a minor son as against the father who refused to go into the box to contradict or accept his son's story has to be rejected on the grounds already set out by us while dealing with the alienations of the properties covered by the other schedules. We accept, therefore, the finding of the Court below in so far as the F schedule properties are concerned.

22. The last alienation which is also challenged by the plaintiffs in the action is that covered by Exhibit B-57 relating to the G Schedule properties which was a sale of family lands on 13th February, 1958. The sale was in favour of the 12th defendant. The 12th defendant examined himself as D.W. 5. He also got his testimony corroborated by examining D.W. 8. D.W. 5 says that the sale was effected in order to pay off a decree debt, a mortgage debt and debts evidenced by promissory notes. That such debts were incurred by defendants 1 and 2 and that they were discharged from and out of consideration paid under Exhibit B-57 are abundantly clear when we examine Exhibits B-58, B-67, B-68 and B-59 to B-64. Nothing clinching has been brought out in cross-examination. The witness reiterates that in the sale deed the debts which were to be paid off, have been recited and that he discharged some of the debts even before registration. He is definite that he discharged all the debts quoted in the sale deed and the consideration paid was fair and reasonable. D.W. 8 is the person who negotiated, in the first instance, for the sale and purchase of the properties comprised in the G Schedule. Though the first defendant and the second defendant agreed to sell the lands to D.W. 8, later on they resiled which necessitated D.W. 8 to file a suit for recovery of the advance of Rs. 2,000. This was the decree debt which was paid off when the second defendant, subsequently, sold the properties to the 12th defendant. That was a sale which was effected by the second defendant for himself and his minor children after he and his brother the first defendant, partitioned the joint family properties amongst themselves in 1953. The net amount received in cash under this deed is only Rs.3,317. Applying the various principles already referred to by us and in the absence of telling evidence which would outweigh the acceptability of the recitals in Exhibit B-57, we are unable to accept the contention that the sale of the G schedule properties is not for the benefit of the family or, at any rate, not for legal necessity.

23. The above discussion therefore, prompts us to accept the findings of the Court below, in all respects, in relation to the dealings of the first or the second defendant or both, as regards the properties described in schedules A to G.

24. In passing, we have to reiterate that this is one of those usual litigations filed by the minor children in the joint family attacking the alienations made by the father either during their minority or immediately thereafter but, certainly, with the encouragement and active support of the parents. Without the first and the second defendants having a hand in the litigation, the plaintiffs would not have dared or could not have been encouraged to file the same. The mother of some of the plaintiffs was representing some of the minors. What prevented her from going into the box and speak against her husband remains unexplained. The appeal is dismissed. As the litigation, in our view, ought to have been sponsored by the parents and the minor plaintiffs ought not to be blamed for it, there will be no order

as to costs in this appeal. The appellants, however, will pay the Court-fee payable to the Government.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

The Union of India represented by Secretary, Ministry of Works, Housing, Urban Development, New Delhi, and another .. *Appellants**

v.

Andhra Bank Limited, Madras-9. .. *Respondent.*

Transfer of Property Act (IV of 1882), sections 106 and 116—Landlord and tenant—Lease of premises for a fixed period—Expiry of period—Landlord claiming enhanced rent—Tenant unwilling to pay higher rent and continuing to remain in the premises—Suit by landlord for difference in rent—Character of the money payable—Civil Court's discretion to fix a reasonable rate either as rent or as damages for use and occupation.

The jural relationship of lessor and lessee springs from a contract; under it, a tenant by reason of the element of transfer of the right in immovable property enjoys such property for a certain time either express or implied or in perpetuity in consideration of price paid or promised. Section 106 of the Transfer of Property Act, which operates in the absence of a contract or local law or usage to the contrary, provides for termination of the lease according to its tenor. In certain cases, a lease is deemed to be one from month to month and in others a lease is from year to year. In the former the lease is determinable by a notice issued by the lessor by fifteen days expiring with the month of tenancy. In the latter, it is determined by a similar but six months' notice expiring with the year of the tenancy. There may be cases where the lessee may continue to remain in possession of the demised property, after the determination of the lease. Section 116 of the Transfer of Property Act provides in such cases, if the lessor or his legal representative accepts rent from the lessee or *otherwise assents* to his continuing in possession, the lease is renewed according to the purpose for which the property is leased, as specified in section 106 of the Transfer of Property Act. In all situations the word "letting" should not be confused with the permission given to another to occupy immovable property as a licensee. The Transfer of Property Act well maintains the distinction between a licensee and a lessee. In the former case no interest in the immovable property is transferred, by which transfer alone the relationship of landlord and tenant is created. [*Para.* 7.]

What then is the position if a tenant holds over in the sense that he continues in possession of the demised premises after the determination of the lease? One such method by which landlord's assent could be presumed is by acceptance of rent. In other cases, there should be reasonable but acceptable proof that the landlord has otherwise assented to the tenant's continuing in possession after determination. In all such cases, the act of the tenant is described as a tenant holding over. By such continuance in possession after determination, the person in occupation is called a tenant at sufferance. If such possession is attributable to the consent of the landlord given either expressly or by necessary implication then he is called a tenant holding over or a tenant at will. But if in a given situation, such consent is not proved, then he is called a tenant by sufferance. [*Para.* 8.]

Weighing the relative contentions of parties, the following principles emerge:

(1) If a tenant at sufferance continues to occupy the premises after the determination of the lease, then he cannot unjustly enrich himself by claiming that he will pay only the quandom rent and not a reasonable rate of damages for use and occupation of the premises.

(2) If he assents to pay the enhanced rent demanded at a time when the landlord determines the lease, then there is no difficulty at all. He will be considered as a

* Appeal No. 209 of 1971. 11th December, 1975.

tenant holding over on the basis of a new contract of lease as between himself and the landlord.

(3) If the tenant, in spite of the warning, contumaciously remains in possession of the premises, the landlord secures a right to get a reasonable compensation from the tenant for such occupation, but it need not necessarily be the enhanced rate of rent claimed by him: but in no circumstances it can exceed the enhanced rate demanded by him ;

(4) The Court should investigate, and it has jurisdiction to do so, and find in its discretion whether the enhanced rate claimed by the landlord, in such circumstances is penal or otherwise equitably justified.

(5) The Court has the power and indeed the discretion to fix a fair and equitable rent in such situation. [*Para.* 29.]

Cases referred to :—

Bhawaji v. *Himatlal*, (1972) 2 S.C.J. 174 : (1972)2 S.C.R. 890: A.I.R. 1972 S.C. 819; *S. Burge* v. *Moulvi Mohammad Inamullah Khan*, 82 I.C. 585 : A.I.R. 1925 Oudh. 189 (3); *Sundar Singh* v. *Ram Saran Das*, A.I.R. 1933 Lah. 61 ; *Madan Mohan Garg* v. *Bohra Ram Lal*, A.I.R. 1934 All. 115 ; *Parekh Nandlal Bhimji Bhoy Ghokshi* v. *Anant Govind Joy Sangli*, A.I.R. 1940 Nag. 140 ; *Lakshmiah Chetty* v. *Rama Nanjundiah*, A.I.R. 1950 Mys. 62 ; *Hajee Mohamed* v. *Globe Theatres*, A.I.R. 1956 Mad. 216 ; *Kuppuswami Pillai* v. *Md. Kasim*, 94 I.C. 308 : (1926) M.W.N. 236: A.I.R. 1926 Mad. 566 ; *Narain Das* v. *Dharam Das*, A.I.R. 1932 Lah. 275; *Sahir Hussain Khan* v. *Sirajul Hao*, A.I.R. 1951 All. 853; *Banarsilal* v. *Bhagwan*, A.I.R. 1965 Raj. 167 ; *Bhagwan Das* v. *Union of India*, A.I.R. 1961 J & K. 39 ; *State of West Bengal* v. *M/s. B.K. Mondal and Sons* (1962) 1 S.C.R.(Supp.)876: A.I.R. 1962 S.C. 779; *D.T. Mangalmurti* v. *State of Bombay*, 1959 S.C.J. 760 : (1959) 2 S.C.R. (Supp.) 180 ; A.I.R. 1959 S.C. 639 : *Dr. H S. Rikhy* v. *The New Delhi Municipal Committee*, (1962) 3 S.C.R. 604 : (1962) 1 S.C.J. 612 : A.I.R. 1962 S.C. 554 ; *Badrilal* v. *Indore Municipality*, (1973) 3 S.C.R. 15 : A.I.R. 1973 S.C. 508.

Appeal against the decree of the IV Assistant Judge, City Civil Judge, Madras in Original Suit No. 5383 of 1967.

The Central Government Standing Counsel, for Appellants.

C. Hanumantha Rao, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The Union of India and the Executive Engineer, C.P.W.D., Madras, who were the defendants in O.S. No. 5383 of 1967, City Civil Court, Madras, are the appellants. The Andhra Bank Limited, owned premises No. 6, Linghi Chetty Street, Madras-1, which had three floors. The Executive Engineer, C.P.W.D on behalf of the Union of India took on lease the second and the third floors of the above premises from 1st July, 1955 on a monthly rent of Rs. 1,150 and on an increased rent of Rs. 1,500 with effect from 1st July, 1959. Certain fittings and fixtures also formed part of the demise. The tenancy continued without any complexity till 30th June, 1962 by which time, the period of the lease expired. The plaintiffs under Exhibit B-2 made it known that on the expiry of the lease, they were not willing to renew the lease and also put on notice the defendants of the fact that they have not expressed their desire in writing for renewal of the lease as contemplated in the original agreement of lease. Under Exhibit B-2, the plaintiffs also notified the defendants that they were in arrears of rent by then. Under Exhibit B-3 dated 24th December, 1962, the defendants expressed their desire to continue as tenants of the premises in question on the same terms and conditions for a further period of three years. On receipt of this, the plaintiffs through their lawyer and under Exhibit A-1, determined the tenancy of the defendants, as there was no notice in accordance with the terms of the original lease from the defendants requesting for a renewal of the lease for a further term. The defendants were, therefore, called upon to quit and deliver vacant possession. This was followed by another letter Exhibit A-2, which ran as follows :

9/4016 29th August, 1963.

The Executive Engineer,
Madras Central Division,
C.P.W.D., Madras.

without prejudice.

Dear Sir,

Re : Premises—rent.

With reference to your letter No. 3722-M dated 27th August, 1963, we have to state that the amount of Rs. 7,500 was received without prejudice to our legal adviser's letter No. 248 of 1963 dated 24th March, 1963, and kept in suspense account—

If you require further lease, we are prepared to renew the lease for a further period of 3 years from 1st April, 1963 on an enhanced rent of Rs. 2,400 per month, at Rs. 40 per 100 sq. ft. The C.P.W.D. pays rent Rs. 45 to Rs. 50 per 100 sq. ft. to our next building "Mysore Bank Building".

Due to high cost of maintenance and increase in local taxes, we were compelled to enhance the rent as above.

We are not in favour of continuing the lease at Rs. 1,500 p.m. any further. Please treat the matter as specially urgent and communicate your acceptance to us immediately.

Yours faithfully,
(Sd.) * *
Manager ".

The plaintiffs made their position clear under Exhibit A-2 that they were not willing to extend the period of the lease and accept the defendants as tenants, unless they were prepared to pay an enhanced rent of Rs. 2,400 per month. They set out the hypothesis under which they have estimated the rent at Rs. 2,400. After an attempt was made by the State Government to requisition the demised property for the use and occupation of the Union Government, which apparently, did not fruition, as is seen from Exhibit B-1, which is a letter from the Collector of Madras to the defendants, the result was that the defendants were continuing in possession of the property after the determination of the lease and after the landlords had made it clear that they should pay an enhanced rent of Rs. 2,400 per month on and after the date of termination of the lease. In fact, the plaintiff under Exhibit A-4 requested the Collector of Madras to withdraw the notification issued under the Requisitioning and Acquisition of Immovable Property Act, 1952 and explained in detail their stand that they were willing to further accommodate the Union Government in the premises provided they were prepared to pay either as rent or as damages for use and occupation of the premises at the rate of Rs. 2,400 per month. The defendants were reminded by Exhibit A-5 dated 30th June, 1964 that the defendants had not replied to the demand for enhanced rent made by the landlords. They have also informed the defendants through the Assistant Engineer C.P.W.D. that if rents are paid at the old rate of Rs. 1,500, it will only be received as part payment of rent and that they were of the view that the defendants are agreeable to pay the difference of Rs. 900 in rent from 1st April, 1963 onwards. Finding that no rents were paid from 1st March, 1964 to 30th September, 1964, the plaintiffs demanded such rent at Rs. 2,400 per month and also reminded the defendants that the difference at the rate of Rs. 900 per month towards the rent for the period commencing from April 1963 to February 1964, was still outstanding. They asked for the payment of such arrears of rent. Further reminders for payment of the arrears of rent at the enhanced rate from the plaintiffs were of no avail. Ultimately, the premises was vacated on 18th April, 1966, but without the defendants paying the difference between the original rent and the demanded enhanced rent. The plaintiffs, therefore, gave their final notice of demand under Exhibit A-10 dated 11th May, 1966 setting out their stand. *Inter alia*, they alleged that as the defendants continued in possession of the demised premises after the termination of the lease, and after a demand for enhanced rent was made and when it was made clear that it would be collected either as rent or as damages for use and occupation, the plaintiffs assumed that the defendants continued in possession by signifying their assent to pay the enhanced rent. As such rent had not been paid, they claimed the arrears of rent by then due in accordance with the enhanced

rate. The plaint was filed in 1967 and described the occupation of the defendants after the 30th of April, 1963 as unlawful and claimed damages for use and occupation of the premises, if not as rent, for the period commencing from 1st May, 1963. But as on the date, when they filed the suit, the plaintiffs restricted their claim only to the allowable period and claimed a sum of Rs. 22,110 being the difference of rent from 1st April, 1964 to 18th April, 1966 at Rs. 900 per mensem or for damages and occupation and Rs. 3,440 being the arrears of rent for the period commencing from 19th April, 1966 to 31st May, 1966 at Rs. 2,400 per mensem or for damages in lieu thereof and in addition claimed a sum of Rs. 579 being the damages to the electrical fittings and installations which formed part and parcel of the lease. The defendants took up the position that they are not bound to pay at the enhanced rate of rent of Rs. 2,400 and the plaintiffs ought to have taken redress in the Rent Control Court, if they were dissatisfied about the rent paid and as rent at the old rate of Rs. 1,500 has already been paid, they denied liability. They denied also their liability to pay any damages towards the breakages of the fixtures. They admitted the correspondence that passed between the parties, but would automatically take up the stand that the plaintiffs are not entitled to enhance the amount as claimed either as rent or as damages.

2. The learned City Civil Judge framed the following issues :

1. Whether the suit is maintainable, in view of the Arbitration Clause in the lease deed ?

2. Whether the plaintiffs can appropriate rents at the alleged enhanced rate, when there has already been a specific appropriation by the defendants ?

3. Whether the alleged damage to electrical fittings and electrical installations is not due to normal wear and tear in use ?

4. Whether the alleged enhanced rent can be claimed by means of this suit ?

5. To what relief ?

Additional Issue :

6. Whether there was any contract to pay rent as Rs. 2,400 p.m. ?

He ultimately decreed the suit for Rs. 25,550 with proportionate costs and found that the alleged damages to the electrical fittings and installations have not been made out. He accepted that by reason of the continuance of the defendants in the premises and since they did not repudiate the demand for enhanced rent, the defendants should be deemed to have signified their consent for payment of such increased rent. It is as against this, the present appeal has been filed.

3. The only question argued before us by Mr. Parasaran, the learned counsel for the appellants is whether the plaintiffs-respondents are entitled as a matter of course, to rent or damages for use and occupation at the enhanced rate on the only ground that the appellants did not repudiate the claim in the normal way. There is no dispute about the quantum claimed by the plaintiffs on the basis of their stand that the defendants were bound to pay such enhanced rent on the ground that they have impliedly assented to it by not replying to it. The question, therefore, is whether the appellants should automatically be made liable to pay rent or damages for use and occupation for the period in question on the only ground that they have not expressly repudiated their liability to pay the enhanced rent.

4. The other question is as to what is the character of the money, which the occupant would, in the above circumstances, be liable to pay to the landlords; whether it is rent or damages for use and occupation.

5. The third question is whether the civil Court, in the absence of consensus as between the parties as regards the rent or damages to be paid by the tenant remaining in occupation after the determination of the tenancy, has jurisdiction to investigate and find what possibly would be reasonably fair rent or reasonable damages in the alternative an occupant should pay to the landlords in the above circumstances.

6. We shall first deal with the general aspect, which flows from the jural relationship of landlord and tenant.

7. The jural relationship of lessor and lessee springs from a contract; under it, a

tenant by reason of the element of transfer of the right in immoveable property enjoys such property for a certain time either express or implied or in perpetuity in consideration of price paid or promised. Under section 106 of the Transfer of Property Act, which operates in the absence of a contract or local law or usage to the contrary, provides for termination of the lease according to its tenor. In certain cases, a lease is deemed to be one from month to month and in other cases a lease is from year to year. In the former the lease is determinable by a notice issued by the lessor by 15 days expiring with the month of tenancy. In the latter, it is determined by a similar but six months notice expiring with the year of the tenancy. There may be cases where the lessee may continue to remain in possession of the demised property after the determination of the lease. Section 116 of the Transfer of property Act provides that in such cases, if the lessor or his legal representative accepts rent from the lessee or *otherwise assents* to his continuing in possession, the lease is renewed according to the purpose for which the property is leased, as specified in section 106 of the Transfer of Property Act. In all situations the word 'letting' should not be confused with the permission given to another to occupy immovable property as a licensee. The Transfer of Property Act well maintains the distinction between a licensee and a lessee. In the former case, no interest in the immovable property is transferred, by which transfer alone, the relationship of landlord and tenant could be created. Vide *Dr. H. S. Rikhy* v. *The New Delhi Municipal Committee*[1].

8. What then is the position, if a tenant holds, over in the sense that he continues in possession of the 'demised premises' after the determination of the lease? One such method by which landlord's assent could be presumed is by acceptance of rent. In other cases, there should be reasonable, but acceptable proof that the landlord has otherwise assented to the tenants continuing in possession after the termination. In all such cases, the act of the tenant is described as a tenant holding over. By such continuance in possession after determination, the person in occupation is called a tenant at sufferance. If such possession is attributable to the consent of the landlord given either expressely or by necessary implication, then he is called a tenant holding over or a tenant at will. But if in a given situation, such consent is not proved, then, he is called a tenant by sufferance. The Supreme Court had occasion to consider such situations in decided cases.

9. In *Bhawaji* v. *Himatlal*[1], the legal position has been stated thus:

> "The act of holding over after the expiration of the term does not create a tenancy of any kind. If a tenant remains in possession after the determination of the lease, the common law rule is that he is a tenant on sufferance. There is a distinction between a tenant continuing in possession after the determination of the term with the consent of the landlord and a tenant doing so without his consent. The former is a tenant at sufferance in English law and the latter a tenant holding over or a tenant at will. The assent of the landlord to the continuance of possession will create a new tenancy. What the section contemplates is that on one side there should be an offer of taking a new lease evidenced by the lessee or sub-lessee remaining in possession of the property after his term was over and on the other side there must be a definite consent to the continuance of possession by the landlord expressed by acceptance of rent or otherwise."

10. In *Badrilal* v. *Indore Municipality*[2], wherein again, Alagiriswami, J., speaking for the Bench, expressed the view that a person, who is lawfully in occupation of the premises does not become a trespasser and if he does not become a tenant holding over, he would be a tenant by sufferance. The essential principle, therefore, appears to be that if the landlord consents to such continuance of the tenant in the premises after the determination of the lease, he would be a tenant holding over, but in the absence of any such consent, he would be deemed to be a

1. (1962) 3 S.C.R. 604 : (1962) 1 S.C.J. 612 : A.I.R. 1962 S.C. 554.

1. (1972) 2 S.C.J. 174 : (1972) 2 S.C.R. 890 : A.I.R. 1972 S.C. 819.
2. (1973) 3 S.C.R. 15 : A.I.R. 1973 S.C. 508.

tenant by sufferance. But in no case he can be characterised as a trespasser. In all such cases, the landlord will be entitled to damages for such use and occupation, the measure of damages being the amount of the profits, which the landlord with due diligence could have received but for the wrongful continuance of the tenant in the property.

11. We have already seen that the landlord gave an option to the tenants in the instant case while determining the tenancy at the end of the agreed lease period. They would say that they were not willing for the tenants continuing in occupation, unless they were prepared to pay a sum of Rs. 2,400 per month as rent or damages for use and occupation. Such was the mesne profits, which the landlords expected, having regard to the prevailing rents in the locality to which he referred under Exhibit 42.

12. Mr. Hanumantha Rao, the learned counsel for the landlords refers to various decisions of the Courts in India and would contend that the lower Court was right in decreeing the suit, as the tenants without the assent of the landlords continued in possession of the property notwithstanding the fact that they were warned that should they be in possession after the determination of the lease, they should pay damages or mesne profits or the fair rent of Rs. 2,400 per month. We shall refer to the various decisions cited by the learned counsel.

13. In *S. Burge* v. *Moulvi Mohammad Inamullah Khan*[1], a single judge of that Court held that if a landlord gives a notice to the tenant that he would be charging him an enhanced rent from a certain date and that the lessee was free to vacate, if he was not accepting such enhancement, then the lessor should be deemed to have agreed to pay the enhanced rent.

14. In *Sunder Singh* v. *Ram Saran Das*[2], a Division Bench of that Court apparently relying upon the English law rule of sufferance to pay double rent by way of damages in case the tenant holds over without consent observed thus:

1. 82 I.C. 585 : A.I.R. 1925 Oudh. 189 (3).
2. A.I.R. 1933 Lah. 61.

"Ordinarily the proper measure of damages in cases where a tenant contumaciously holds over is twice the amount of the rent payable by the tenant."

15. In *Madan Mohan Garg* v. *Bohra Ram Lal*[1], when an increased rent was demanded by the landlord giving an option to the tenant to vacate, if he was not inclined to pay it and equally refused to vacate, the learned single Judge of that Court held that the tenant must be held to have agreed by implication to hold over and to have accepted the proposal to pay rent at the enhanced rate proposed by the landlord in his notice and, therefore, the landlord could claim the rent as demanded. Here again, the English law principle of payment of double rent in default was refered to.

16. In *Parekh Nandlal Bhimji Bhoy Chokshi* v. *Anant Govind Jog Sangli*[2], a single Judge of that Court, after referring to the Oudh and Allahabad judgments, held that the tenant in such circumstances, should be deemed to have accepted the enhanced rent in spite of his refusal; but added that the Court has a discretion in the matter and where the enhanced rate demanded is obviously penal and impossible, the Court would not grant it.

17. *Lakshmiah Setty* v. *Rama Nanjundiah*[3], the learned Judge was prepared to fall in a line with the ratio in the decision of the Oudh Court.

18. Ramaswami, J., in *Hajee Mohamed* v. *Globe Theatres*[4], laid down, according to us, the more equitable rule, which should be adopted in such circumstances, as follows:

"In a suit for payment of mesne profits by a landlord against his tenant holding over after the expiry of the lease, the rentals of other pieces of property more or less of same description is a recognised method of determining mesne profits. This method is subject to this defect, namely, no two pieces of property can be precisely similar in all their circumstances and conditions. There must be

1. A.I.R. 1934 All. 115.
2. A.I.R. 1940 Nag. 140.
3. A.I.R. 1950 Mys. 62.
4. A.I.R. 1956 Mad. 216.

differences always though of varying degrees and no hard and fast rule can be laid down as to the allowances to be made for such differences.

But valuation is not an exact science. It is an enquiry relating to a subject abounding in uncertainties where there is more than ordinary guess work and where it would be very unfair to require an exact exposition of reasons for the conclusions arrived at. A certain amount of conjecture is inevitable but Courts should be careful not to go too far in this direction."

19. In fact Odgers, J., in *Kuppuswami Pillai* v. *Mohammed Kasim*[1], touched upon the equitable rule referred to by Ramaswami, J., in the above case and said that a tenant remaining in possession after the determination of the lease is liable for reasonable damages for so remaining in possession.

20. On the basis of the above decisions, learned counsel for the respondent says that the claim of the landlord for enhanced rent or damages is *per se* sustainable. According to him, the Court cannot investigate whether the demand is reasonable or not and as long as the contumaciousness on the part of the tenant in continuing in possession after determination is indisputed, he has to suffer the demand for enhanced rent.

21. Mr. Parasaran, on the other hand, while hesitantly saying that the demand for enhanced rent would not automatically be enforced in the absence of a denial by the tenant or a refusal on his part to vacate, suggests more or less a *via media* basing on the equitable principles already referred to and laid down in the other decisions referred to by him.

22. We have already referred to the decision in *Kuppuswami Pillai* v. *Mohammed Kasim*[1], wherein this Court was of the view that the enhanced demand cannot automatically be pressed into service, but it should be proved and established to be a legitimate and a reasonable demand in cases where the tenancy has been determined and the tenant continues in the demised premises by sufferance.

23. In *Narain Das* v. *Dharam Das*[1], a Division Bench was considering a similar situation. In that case, a tenant failed to vacate notwithstanding a notice to quit received by him from the landlord and notwithstanding the threat extended by the landlord that if he failed to vacate, he would be charged double rent. The learned Judges said that it was a matter of discretion resting with the Court to decide whether a tenant contumaciously holding over should be penalised to the extent of making him pay double the rent or some lesser amount.

24. In *Sahir Hussain Khan* v. *Sirajul Hao*[2], a Division Bench of that Court said that a tenant, in such circumstances, would be liable to pay damages for use and occupation at a reasonable rate not exceeding the enhanced rate stated in the notice for the period of the holding over.

25. In *Banarsilal* v. *Bhagawan*,[3], the Court reiterated the principle that the Court has the discretion to award damages; but stated that the lessor cannot as of right claim the enhanced rate of rent as demanded by him. They would characterise the action of the landlord as an offer and unless it is accepted by the tenant, the lessor cannot enforce that condition by his unilateral action.

26. In *Bhagwan Das* v. *Union of India*[4], a Division Bench of that Court consisting of the Chief Justice and S. Murtaza Fazl Ali, J., said:

"Where the tenant after the expiry of the lease remains in occupation of the premises in spite of the fact that the landlord served a notice on him to vacate and warned him that if he remains in occupation he will have to pay a specified sum as damages for wrongful use and occupation of the building, the defendant-tenant will be liable to pay that amount provided it is not penal and unconscionable."

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1. (1926) M.W.N. 236 : 94 I.C. 308 : A.I.R 1926 Mad. 566.

1. A.I.R. 1932 Lah. 275.
2. A.I.R. 1951 All. 853.
3. A.I.R. 1965 Raj. 167.
4. A.I.R. 1961 J. & K. 39.

27. The Supreme Court, in *State of West Bengal* v. *M/s. B.K. Mondal and Sons*[1], to put it in our own words, felt that in such circumstances, though there is no contract as is ordinarily understood the conduct of the parties creates a relationship resembling that arising out a contract. This is based on the well-known principle of avoidance of unjust enrichment on the part of the lessee.

28. In a case where the rent has not been fixed or agreed upon between the landlord and the tenant, that the Court can intervene and fix a fair and equitable rent, has been stressed upon by the Supreme Court in *D.T. Mangalmurti* v. *State of Bombay*[2].

29. Weighing the relative contentions of parties, the following principles emerge:

1. If a tenant at sufferance continues to occupy the premises after the determination of the lease, then he cannot unjustly enrich himself by claiming that he will pay only the quondam rent and not a reasonable rate of damages for use and occupation of the premises.

2. If he assents to pay the enhanced rent demanded at a time when the landlord determines the lease, then there is no difficulty at all. He will be considered as a tenant holding over on the basis of a new contract of lease as between himself and the landlord.

3. If the tenant, in spite of the warning, contumaciously remains in possession of the premises, the landlord secures a right to get a reasonable compensation from the tenant for such occupation but it need not necessarily be the enhanced rate of rent claimed by him; but in no circumstances, it can exceed the enhanced rate demanded by him.

4. The Court should investigate and it has the jurisdiction to do so; and find in its discretion whether the enhanced rate claimed by the landlord, in such circumstances is penal or otherwise equitably justified.

5. The Court has the power and indeed the discretion to fix a fair and equitable rent in such situations.

1. (1962) 1 S.C.R. (Supp.) 876: A.I.R. 1962 S.C. 779.
2. 1959 S.C.J. 760 : (1959) 2 S.C.R. (Supp.) 180 : A.I.R. 1959 S.C. 639.

30. On the merits, we have seen that the respondent in this appeal not only determined the tenancy of the appellants at the appropriate time, but refused to renew the lease for a further period of three years from 1st April, 1963. On the other hand, under Exhibits, A-2 and A-4, the respondent as landlord made it clear that the appellants could continue in occupation provided an enhanced rent of Rs. 2,400 per month was paid. The tenants also were warned that they would be charged damages for use and occupation at the same rate, if they fail to agree to pay the enhanced rent. The lower Court was wrong in assuming an implied contract as between the landlord and the tenants on the only ground that the tenants did not expressly repudiate their liability to pay rents or damages at the rate claimed. Undoubtedly, the occupation of the appellants after the date of determination of the tenancy was contumacious in nature and they were tenants remaining in the premises by sufferance. They have to pay a reasonable rent or damages for such contumacious occupation. The Court, as already stated by us, has the discretion to fix a reasonable rate in either case. The lower Court was wrong when it stated that it was open to the defendants to file a petition for fixation of fair rent for, it is admitted before us that at the relevant time, the parties could not approach and get the benefit of the Rent Control Legislation in the matter of the fixation of fair rent. It cannot be said that by the mere fact that defendants elected to occupy the premises compelled them to pay the enhanced rent as a matter of course. We are, therefore, unable to agree with the finding of the Court below that the enhanced rent could be claimed by the respondent. It is a matter, which has to be further investigated by the Court and in its discretion fix a reasonable rate either as rent or as damages for use and occupation. The tenants were paying with impunity only the quondam rent of Rs. 1,500. The landlord demanded a rent of Rs. 2,400 as damages at that rate basing their claim on the rent said to be prevailing in the locality. The lower Court ought to have probed into this aspect and found on further evidence or on the evidence on record as to what could be the possible reasonable rent or at what rate the appellants

should suffer damages for such contumacious overstay.

31. We, therefore, remit the subject-matter to the Court below for ascertaining as to what possibly could be the fair and equitable rent or rate of damages for the period as claimed by the landlord and accepted by the Court and thereafter grant the decree quantifying such arrears of rent or damages as the case may be. The parties are at liberty to adduce fresh evidence before the trial Court, if they consider necessary.

32. Accordingly, the appeal is allowed in part, but there will be no order as to costs.

R.S. —— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*N. S. Ramaswami, J.*

The Union of India owning the Railways in India represented by the General Manager, Southern Railway, Park Town, Madras and others .. *Appellants**

v.

C. A. Akhthar and Co., represented by its partners .. *Respondents.*

Indian Railways Act (IX of 1890), section 74—Delay in transportation of goods—Duty of Railway Administration to explain delay—Damage or deterioration of goods—Allegation of negligence or misconduct of railway administration—Burden of proof.

The railway administration should place all the necessary evidence regarding the movement of the goods because that is exclusively within its knowledge, and therefore when the administration does not place all the necessary evidence to explain the delay it is not unreasonable to infer that there has been negligence on its part in the transport of goods. The mere fact that there has been negligence on the part of the railway administration in the transport of the goods does not *ipso facto* lead to the conclusion that the damage or deterioration to the goods is due to such negligence. [*Paras.* 8, 9.]

Under section 74 (3) of the Indian Railways Act, except upon proof that the damage or deterioration was due to negligence or misconduct on the part of the railway administration, the administration cannot be held responsible for such damage or deterioration. Therefore, the plaintiffs have necessarily to prove that such damage or deterioration is due to negligence or misconduct on the part of the railway administration. Unless the plaintiffs let in evidence regarding the condition of the goods when they were booked, they cannot be heard to say that the deterioration to the goods should necessarily be connected with the delay in the transport amounting to negligence on the part of the railway administration. [*Para.* 12.]

Held on facts that the damage or deterioration to the goods was not due to the delay on the part of the railway administration. [*Para.* 15.]

Cases referred to:—

Abdul Shukoor & Co., v. *Union of India*, (1971) 1 M.L.J. 400; *A. R. Ahmed & Co.*, v. *Union of India*, (1972) 80 L.W. 413 : A.I.R. 1972 Mad. 454.

Appeal against the decree of the Court of the I Assistant Judge, City Civil Court, Madras in O.S. No. 1915 of 1963.

P. S. Srisailam, for Appellant.

A. Ramanathan, for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit for damages in respect of certain bundles of dry salted cow hides transported through the railways. The plaintiffs are the consignees of 210 bundles of dry salted cow hides, the same having been consigned from Shillong, in the State of Assam. The said 210 bundles were consigned on 6th April, 1962. 105 bundles had been loaded in one wagon and another 105 bundles were loaded in a second wagon. One wagon reached Salt Cotaurs at Madras, the place of destination, on 9th June, 1962 and the other reached only on 20th June, 1962. The consignees demanded open delivery and it was given

* Appeal No. 152 of 1970. 8th *December*, 1975.

The goods were found to be deteriorated and the Claims Inspector of the Southern Railway evaluated the damages at Rs. 4,780.38. The consignees filed the suit for damages for a sum of Rs. 8,303.16, which according to them, is the correct value of the damages of the goods, contending that the deterioration of the goods was due to negligence or misconduct on the part of the railways.

2. The railway administration contended that the deterioration was due to inherent vice of the goods and not due to any negligence or misconduct on its part and that therefore the plaintiff should be non-suited.

3. The Court below held that there has been unexplained delay on the part of the railway administration in the transport of the goods, that such delay shows that there had been negligence on the part of the railway administration and that therefore it must be held that the deterioration of the goods was due to the negligence of the railway administration. The Court, however, did not accept the valuation of the consignees (plaintiffs) regarding the damages, but accepted the valuation made by the Claim Inspector, Southern Railway and has granted a decree for Rs. 4,780.38, with interest at six per cent. per annum from the date of plaint. The plaintiffs have accepted the decree. The railway administration which is the defendant in the case, has filed this appeal.

4. On the question of fact whether there has been delay on the part of the railway administration in the transport of the goods, I think the view of the trial Court is right. It has been alleged in the plaint that the normal time for transport of the goods from Shillong to Salt Cotaurs, Madras, is about two weeks. This is denied by the railway administration. There is no evidence on either side as to the normal time to be taken for transport of goods from Shillong to Madras. Even so it cannot be seriously disputed that there has been delay. The goods had been accepted by the railway administration for transport on 6th April, 1962. Part of the same had reached Salt Cotaurs only on 9th June, 1962. This is roughly two months after the booking. The remaining part reached Salt Cotaurs only about 2½ months after the date of booking. It may be noted here that Shillong has no railway station. The nearest railway station is at Gauhati said to be about 63 miles from Shillong. An out-agency run by the State Transport Department is doing the work of the Railway between Shillong and Gauhati. Though the packing of the goods and issue of the railway receipt was on 6th April, 1962, it is stated that according to practice, the goods were allowed to be in the custody of the consignor himself and that the goods were actually loaded in the trucks of the State Transport Department only on 6th May, 1962, *i.e.* one month after the date of booking. Exhibits B-2 to B-4 which are certain slips sent by the State Transport Department to the consignor show that on three occasions, *i.e.*, on 6th April, 1962, 13th April, 1962 and 19th April, 1962 the trucks of the State Transport Department were taken to the warehouse of the consignor for being loaded, but they had to return without being so loaded, due to rains. They were actually loaded only on the fourth occasion when the trucks went to the warehouse of the consignor on 6th May, 1962. Then the goods were taken to Gauhati and transported from Gauhati to Salt Cotaurs in two wagons.

5. One contention on behalf of the railway administration is that as the goods were actually in the custody of the consignor between 6th April, 1962 and 6th May, 1962 that period should be excluded for considering the question whethar there has been delay on the part of the railway administration in the transport of the goods. I think it is unnecessary to go into the question as to who exactly is responsible for the delay between 6th April, 1962 and 6th May, 1962 for even after 6th May, 1962 the goods had not been transported in proper time.

6. It is not clear when exactly the goods left Gauhati, whether it was 6th May, 1962 itself or only on 7th May, 1962. Anyway, even excluding the period of one month between 6th April, 1962 and 6th May, 1962 the interval is too long for the railway administration to say that there had been no delay on their part. Even though there is no evidence that the normal time for transport from Shillong

to Madras is only two weeks, the period taken for transhipment in this case is undoubtedly too long and therefore there is no serious dispute that there has in fact been delay.

7. It is also fairly clear from the evidence on record that the delay has not been properly explained by the railway administration. As pointed out by the trial Court, even though the railway administration has called eight witnesses to prove the movement of the wagons, there is lack of evidence as to when exactly the goods were loaded in the wagons at Gauhati, when exactly the wagons rolled out of Gauhati and what happened at several other points. For instance, there is no evidence as to when the wagons arrived at Bagalpur and when they were sent out of that place. Under these circumstances, it is not seriously disputed before me that there has been unexplained delay on the part of the railway administration regarding transport of the goods.

8. It is for the railway administration to place all the necessary evidence regarding the movement of the goods because that is exclusively within its knowledge and therefore when the administration does not place all necessary evidence to explain the delay it is not unreasonable to infer that there has been negligence on its part in the transport of the goods. To this extent, the conclusion of the learned trial Judge is correct. However, the learned Judge has missed the real point in this case.

9. The mere fact that there has been negligence on the part of the railway administration in the transport of the goods does not *ipso facto* lead to the conclusion that the damage or deterioration to the goods is due to such negligence. It is to be noted that the goods transported are dry salted cow hides. It is not disputed by the learned counsel for the respondents (plaintiffs) that these hides though they are dry salted hides have an inherent vice and at some point of time such vice would assert itself and deterioration of the hides would start. However, no literature has been placed before me as to the period during which a well cured dry hide would preserve itself without deterioration. In other words, no literature is placed before the Court to show how long it would take for the inherent vice in the cow hides to assert itself, even when such hides are properly cured.

10. In *M/s. East Asiatic Co., (P.) Ltd.* v. *Union of India*[1], a Division Bench of this Court, after referring to the literature on the subject observed :

> "While in England a properly cured hide, can be preserved for one year, in India it can hardly be preserved for more than six or seven weeks from putrefactive damages."

The Division Bench also held that :—

> "Unless the plaintiffs are able to place before the Court, the data regarding the dates of curing and the interval also that had elapsed between slaying and the curing, there is every possibility that the inherent vice in the goods had begun to operate and brought the goods to such a condition that though they might not have deteriorated at the moment of despatch, deterioration was just round the corner, and could have taken place at any time thereafter during transit."

11. In the present case the plaintiffs have not called any evidence as to when exactly the goods were purchased by the consignor. There is absolutely no evidence regarding the date of slaying, the date or dates on which the curing had been done and as to whether there was proper curing of the hides. In fact, there is no evidence at all regarding what happened at the consignor's end. The only two witnesses called by the plaintiffs are those who were present when the goods were taken open delivery of at Salt Cotaurs, Madras. That being so, the question is whether one can say, with any amount of certainty, that the deterioration of the goods was due to delay on the part of the railway administration. I am of the view that the deterioration may as well be due to inherent vice and due to the fact that the hides had not been properly cured and that they were not fresh even when they were packed for despatch.

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1. A.S. No. 193 of 1960.

12. Under section 74 (3) of the Indian Railways Act, except upon proof that the damage or deterioration was due to negligence or misconduct on the part of the railway administration, the administration cannot be held responsible for such damage or deterioration. Therefore, the plaintiffs who have come to Court with the allegation that there has been damage or deterioration to the goods as in the present case, have necessarily to prove that such damage or deterioration is due to negligence or misconduct on the part of the railway administration. It is no good saying that there has been negligence on the part of the administration and that therefore it must be held that the damage or deterioration to the goods is due to such negligence. As I said the damage or deterioration might as well as be due to some other cause such as inherent vice as referred above. Therefore, unless the plaintiffs let in evidence regarding the condition of the goods when they were booked, they cannot be heard to say that the deterioration to the goods should necessarily be connected with the delay in the transport amounting to negligence on the part of the railway administration. The principle enunciated in the Bench Decision referred above squarely applies to this case. Of course in that case there was no delay on the part of the railway administration. There, the goods had been booked at Vizianagaram to Royapuram. The normal time for transport would be ten days. But, the interval between the date of booking and the arrival of goods at Royapuram was 27 days. However, the railway administration gave a proper explanation for the delay of 17 days. Therefore, it was held that there was no negligence on the part of the railway administration. But, what is to be noted is the Division Bench has followed the decision of another Division Bench in *A. Abdul Shukoor & Co., Madras* v. *The Union of India, represented by the General Manager, Central Railways, Bombay and others*[1], and accepted the principle that lack of evidence as to when the hides or skins were cured is destructive of the plaintiffs' case. It has been pointed out by the Division Bench which decided the Second Appeals referred above, that it is very material to note when the skins or hides were actually cured as there is the possibility of a long time having already lapsed by the time the consignment was booked.

1. S.A. Nos. 1069 to 1074 and 1295 of 1960.

13. The learned counsel for the respondents (plaintiffs) referred to *Abdul Shukoor & Co.* v. *Union of India*[1], where Ramamurthi, J., had dealt with a case of wet salted goat and sheep skin sent from Bolanganj to Madras. The interval between the date of booking and the arrival of the goods at Madras was 23 days though the normal time to be taken is only 10 days. It was held by the learned Judge that the abovesaid delay had not been explained by the railway administration and that showed that the administration was guilty of negligence. The learned Judge further held that the plaintiffs in that case had positively proved that the skins had been properly cured, packed etc. In other words, the learned Judge held that there was no possibility of the deterioration of the goods being the result of any inherent vice in the goods but the deterioration was only due to negligence on the part of the administration. That case has no application to the facts of the present case, because as already noticed, the respondents (plaintiffs) have not placed any evidence whatsoever regarding the condition of the goods before they were booked and consigned.

14. Mr. Srisailam, learned counsel for the railway administration relied on *A. R. Ahmed & Co.* v. *Union of India*[2], where Ismail, J., had to deal with a case of wet salted goat skins which were booked from Raipur to Madras. The interval between the date of booking and the arrival of the goods at Madras was 46 days. Even though there was no clear finding as to the normal period to be taken for the journey, it was held that there had been some delay, in the transport of the goods which amounted to negligence on the part of the railway administration. Even so the claim for damages had been negatived. The learned Judge has observed at page 460 that the plaintiff had not established that the

1. (1971) 1 M.L.J. 400.
2. (1972) 85 L.W. 413 ; A.I.R. 1972 Mad. 454

deterioration of the goods was due to the delay on the part of the respondents, and that he could have shown this by producing necessary evidence as to when the skins were salted or cured and what was the interval between slaying and salting. It was further pointed out that in the absence of any such evidence to show that on the dates when the skins were consigned they were in a position to withstand the transit of the normal period it cannot be held that the plaintiffs had proved or established that the deterioration was due to the delay on the part of the railway administration in the carriage of the goods.

15. The decision is sought to be distinguished by Mr. A. Ramanathan, learned counsel for the respondents (plaintiffs) on the ground that in that case there were endorsements on the railway receipts that the goods had not been properly cured and therefore they are liable to be damaged in transit. In fact, the learned Judge has referred to such endorsements as a crucial or very significant feature, and therefore on facts that case cannot be said to be on all-fours with the present one. Even so, the observation of the learned Judge referred to above is in line with the two Bench decisions (1) in S.A. Nos. 1069 to 1074 and 1295 of 1960 and (2) in A.S. No. 193 of 1960. There is no escaping the position that for a plaintiff who comes to Court in a case like this, it is for him to show as to when the curing was done, the interval between the time of slaying and curing, as to whether curing had been done properly and whether the goods were in such a condition as to withstand the transit of the same in normal period. As there is no such evidence in the present case, it is not right to hold that the damage or deterioration to the goods should be only due to the delay on the part of the railway administration. It is quite possible that the goods though not actually deteriorated at the time of consignment was about to deteriorate by that date.

16. The learned trial Judge has completely overlooked this aspect of the matter and he simply stated that as there has been unexplained delay on the part of the railway administration, the damage or deterioration should necessarily be linked with the same. That is certainly not correct.

17. In the result, the appeal is allowed and the plaintiffs' suit is dismissed. But in the circumstances of the case, I direct the parties to bear their respective costs throughout.

R.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*G. Ramanujam, J.*

Muthammal and another . . *Petitioners**

v.

The Secretary, Kolathur Blacksmithy and Carpentry Workers' Industrial Co-operative Society Limited, Kolathur Post, Mettur Taluk, Salem District and another . . *Respondents.*

Tamil Nadu Co-operative Societies Act (LIII of 1961), *sections* 73 *and* 25 (1) (b)—*Tamil Nadu Co-operative Societies Rules* (1963), *rule* 56—*Deficit in stock—Action by Society against President for recovery—President's death pending proceedings—Action against legal representatives—Limitation—Rule* 56 *to be followed—Claim held barred.*

The audit report for the period from 1st April, 1966 to 31st March, 1969, relating to a Co-operative Society showed that there was a deficit in the stocks of various articles to the value of about Rs. 5,946.19. The president of the society was removed from office. The society filed an arbitration case for recovery under section 73 (1) (*c*) of the Tamil Nadu Co-operative Societies Act, 1961. Pending this, the president died on 8th November, 1970. Taking note of his death, the arbitrator dismissed the claim of the society on 12th November, 1970. The society took an appeal to the Co-operative Tribunal who held that the arbitrator was in error in dismissing the case and said that the proper thing was to permit the society to bring the legal representatives on record. The society did not pursue the

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* C.R.P. No. 1246 of 1975. 20*th February*, 1976.

matter further and the arbitrator dismissed the case for non-prosecution. Subsequently, the society filed a fresh arbitration claim on 16th August, 1972 against the legal representatives for recovery of the deficit. The legal representatives raised the objection that the claim was barred under rule 56 of the Tamil Nadu Co-operative Societies Rules, 1963. The arbitrator, however, overruled this and passed a decree against the legal representatives by his order, dated 24th April, 1973 against which the legal representatives went on appeal to the Tribunal and failed. They then filed a revision to the High Court.

Held : On the facts there could be no doubt that the claim filed against the petitioners on 16th August, 1972 was beyond the period of 3 years provided for in rule 56. Therefore the arbitration claim having been filed more than three years before that last date, *i.e.*, 31st March, 1969 before which the act or omission could have taken place, it was clearly out of time as per rule 56 (1). The date of the audit report could not be material for the purpose of reckoning the period of limitation and it could not have the effect of extending the period of limitation prescribed under rule 56 which has relevance only to the date on which the act or omission took place. [*Para.* 8.]

Petition under Article 227 of the Constitution of India praying the High Court to revise the Order of the Court of the District Judge, Salem, dated 12th February, 1975 and made in C.M.A. (O.S.) No 7 of 1974 confirming the order, of the Assistant Director of Industries and Commerce (Industrial Co-operative) and Arbitrator, Salem-1, dated 24th April, 1973 and made in A.R.C./62/72-73/IAI/Rc. 743/72.

K. Duraiswami, for Petitioners.

S. Ramalingam, Assistant Government Pleader, for Respondents.

The Court made the following

ORDER.—The petitioners are the legal representatives of one deceased Ramalingam who was the president of the Kolathur Blacksmithy and Carpentry Workers' Industrial Co-operative Society Limited, Kolathur, Mettur Taluk, Salem District till 31st August, 1969 when he was removed from that office. From the audit report for the period from 1st April, 1966 to 31st March, 1969 it was found that there has been a deficit in the stocks of various articles to the extent of about Rs. 5,946-19. The society filed an arbitration case for the recovery of the said amount of Rs. 5,946-19 being the value of the stock found short, under section 73 (1) (*c*) of the Tamil Nadu Co-operative Societies Act, 1961 (hereinafter called the Act). While the said arbitration case was pending, the said Ramalingam died on 8th November, 1970. Taking note of his death, the arbitrator dismissed the claim of the society on 12th November, 1970 on the ground that the claim has abated and that it is for the society to file a fresh claim against the legal representatives.

2. The society took the matter in appeal to the Co-operative Tribunal (the Principal District Judge, Salem), and the Tribunal by its Order, dated 12th February, 1975 held that the arbitrator was in error in dismissing the arbitration case with a direction to file a fresh claim on the same cause of action as against the legal representatives and that the proper thing would have been to permit the society to bring the legal representatives on record in the arbitration case which was pending on the date of the death of the said Ramalingam. In this view, the Tribunal directed the arbitrator to take the arbitration case on file and to proceed with the same after bringing the legal representatives on record. The society, however, did not take advantage of the Tribunal's decision and take steps to bring the legal representatives on record. The result was the arbitration case came to be dismissed by the arbitrator for non-prosecution.

3. Subsequently the society filed a fresh arbitration claim against the petitioners the legal representatives of the said Ramalingam. On 16th August, 1972 for recovery of the said sum of Rs. 5,946-19. The petitioners defended the said arbitration case *inter alia* on the ground that the fresh arbitration claim was barred by limitation, in that it has been filed beyond the three-year period prescribed under rule 56 of the Tamil Nadu Co-operative Societies Rules, 1963 (hereinafter called

the Rules). The arbitrator, however, by his order, dated 24th April, 1973 overruled the petitioner's contention based on limitation and proceeded to pass a decree against the petitioners after holding them liable on merits.

4. Aggrieved against the said order, dated 24th April, 1973 of the arbitrator, the petitioners filed an appeal before the Co-operative Tribunal again reiterating their contention among others that the reference to the arbitrator as against them under section 73 is beyond time and therefore the arbitration claim should have been dismissed *in limine*. The Tribunal took the view that as the fresh claim against the petitioners on 16th August, 1972 was filed within three years from the date of the audit report from which the deficiency in stocks was found it was in time and that in any event the arbitration case could be validly entertained under section 25 (1) (*b*) of the Act which preserved the liability of a deceased member for the debts of the society for the period of 2 years from his death. As the death of the president was on 8th November, 1970 and the fresh arbitration claim has been filed on 16th August, 1972 *i.e.*, within a period of two years from the date of the death of the president, the Tribunal took the view that the arbitration case which has been filed within two years from the date of the death of the president should be held to be within the time. The Tribunal also disposed of the appeal on merits; and ultimately held the petitioners liable for the sum claimed by the society.

5. In this revision filed under Article 227 of the Constitution, the petitioners have challenged the validity of the order of the Tribunal both on the ground of limitation as well on merits. Having regard to the view I take on the question of limitation, it is not necessary to deal with the case on merits.

6. As regards the question of limitation, the learned counsel for the petitioners has taken me through the provisions in section 73 of the Act and rule 56 of the Rules which occurs under the chapter—Settlement of disputes. Under section 73 (1) the society has to approach the arbitrator for deciding a dispute between the society and its member, past member or a person claiming through a member, past member or a deceased member. According to the learned counsel that dispute having been admittedly referred to under section 73 (1), rule 56 which prescribes a time-limit for making such a reference should strictly be followed and if any dispute has been referred beyond the time-limit prescribed under the said Rule, it would be incompetent. Rule 56 (1) states that the reference of any dispute under sub-section (1) of section 73 shall be in writing and sub-rule (2) states that the period of limitation for referring a dispute mentioned in sub-rule (1) shall be regulated by the provisions of the Indian Limitation Act, 1963 as if the dispute were a suit, and the Registrar, a civil Court. Then comes the following proviso to that sub-rule :

> "Provided that a dispute between (*i*) the society or its committee; and (*ii*) any past committee, any past officer, past agent or past servant or the nominee, heirs or legal representatives of any deceased officer, deceased agent or deceased servant of the society shall, where the dispute relates to any act or omission on the part of the society or its committee, or any past committee, any past officer, past agent, or past servant, or the nominee, heirs or legal representatives of any deceased servant of the society, be referred to the Registrar within three years from the date on which the act or omission with reference to which the dispute arose, took place."

7. The learned counsel for the petitioner submits that all the arbitration claims filed under section 73 are to be governed by rule 56 and that in this case the act or omission in respect of which the dispute arose has clearly taken place in any event before 31st March, 1969 and that therefore the arbitration claim filed against the petitioners on 16th August, 1972 should be taken to be barred by time. In this connection the learned counsel points out that the original claim against the deceased member and the present claim against the petitioners who are legal representatives are based on the audit reports, dated 24th July, 1969; 31st October, 1969 and 30th June, 1970 respectively. The learned counsel also attacks the finding of the Co-operative

Tribunal that the arbitration claim could be filed within two years from the date of the death of the ex-president under section 25 (1) (*b*) on the ground that even if the liability of the deceased president is kept alive by virtue of the provisions of section 25 (1) (*b*) the enforcement of that liability can only be under section 73 and that so long as the claim has not been filed under section 73 within the time-limit prescribed by rule 56, the liability even if it exists cannot be validly enforced against the petitioners. I am inclined to agree with the above contentions.

8. The view of the Tribunal that the claim under section 73 is not barred by time in view of rule 56, as it has been filed within 3 years from the date of audit report and that in any event, the claim is in time in view of section 25 (1) (*b*) which keeps alive the liability of the deceased member for a period of two years, is in my view erroneous. On the facts there could be no doubt that the claim filed against the petitioners on 16th August, 1972 is beyond the period of 3 years provided for in rule 56. The claim is based on the act or omission said to have taken place when the deceased ex-president was functioning as the president, for the period 1st April, 1966 to 31st March, 1969. Therefore, the last date before which the act or omission could have taken place can only be on 31st August, 1969. Therefore, the arbitration claim having been filed more than three years before that last date before which the act or omission could have taken place, it is clearly out of time as per rule 56 (1). Both the arbitrator as well as the Co-operative Tribunal have proceeded on the basis that the limitation will begin to run under rule 56 only from the date of the audited report from which the society came to know about the act or omission of the ex-president. I do not see how the date of the audit report will be material for interpreting rule 56. The Rule says that the limitation will begin " from the date on which the act or omission ...... took place ". The date of act or omission cannot in any sense be equated to the date of the report by the auditor. Even if the said report forms the basis for taking action against the ex-president that cannot be taken to be the date from which the period of limitation is to be reckoned. If that was the intention the proviso "would have used the expression " from the date of knowledge of the act or omission with reference to which the dispute arose took place ". I am therefore of the view that the date of audit report cannot be material for the purpose of reckoning the period of limitation and it cannot have the effect of extending the period of limitation prescribed under rule 56, which has relevance only to the date on which the act or omission took place.

9. As regards the view taken by the Tribunal that the said section 25 (1) (*b*) will extend the period of limitation if deceased member or president dies, and therefore the claim filed against the petitioners on 16th August, 1972 being within two years from 8th November, 1970, the date of the death of the ex-president, should be taken to be in time the same cannot be accepted as correct. Section 25 (1) (*b*) merely keeps alive the liability of the deceased member for a period of two years to be enforced against his estate. Having regard to the fact that even such liability has to be enforced only by filing a claim under section 73, the claim has to be filed within the period of three years referred to in rule 56. Apart from section 73 there is no other provisions in the Act under which the claim under section 23 (1) (*b*) may be enforced. A perusal of section 73 indicates that even the claims against the heirs or legal representatives of any deceased member or past member should be agitated only thereunder. Therefore, it is not possible to say that for enforcing the claim under section 24 (1) (*b*) there is a different procedure with a different period of limitation. Where a claim is made against a member, past member or against the legal representatives of such a member or past member, the claim has to be agitated only under section 73 read with rule 56. The claim in this case having been filed beyond the period prescribed under rule 56, it is not maintainable. In this view the order of the Arbitrator as confirmed by the Co-operative Tribunal has to be set aside and it is set aside accordingly.

10. The civil revision petition is allowed. No costs.

S.J. —— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Sethuraman, J.*

Ramalakshmi Ammal .. *Appellant**

v.

Seeniya Pillai .. *Respondent.*

Limitation Act (XXXVI of 1963), Article 61 (b)—Usufructuary Mortgage—Suit for declaration—Transfer of property by mortgagee—Gift of property by mortgagor to her son—Suit whether within time.

One *M* executed a usufructuary mortgage in favour of her sister *S* on 26th November, 1928 and the time for redemption was 14th August, 1930. If it was not redeemed by that time the mortgagee was to become the absolute owner. The mortgage was not redeemed by 14th August, 1930. The mortgagee sold the property on 18th August, 1933 to one *K* who in turn executed a gift deed on 6th August, 1968 in favour of the 7th defendant. *M* however executed a gift deed of the same property in favour of her son, the plaintiff on 2nd October, 1970. The plaintiff filed a suit after the death of *M*, for declaration and recovery of possession of the property. The trial Court dismissed the suit holding that the suit was barred by limitation and that *K* had acquired title by adverse possession. On appeal, the learned Subordinate Judge decreed the suit holding that the plaintiff knew about the alienation only in 1970 and the suit was within time. On further appeal by the 7th defendant,

Held, Article 61 (*b*) of the Limitation Act, 1963, was the appropriate article which applied to the facts of the case. Article 61 (*b*) applied to a case where the mortgagor sued for possession of the property mortgaged which was afterwards transferred by the mortgagee for valuable consideration. The plaintiff had not shown that he or his predecessor-in-title, *M*, knew about the transfer by the mortgagee only within a period of twelve years before the suit. The suit was, therefore, clearly barred by Article 61 (*b*). [*Para.* 15.]

Cases referred to:—

Nawab Suleman Bahadur v. *Mirza Fida Hussain Khan,* A.I.R. 1945 Oudh 258 ; *Dhanalakshmi Ammal* v. *Anthuraj,* (1972) 2 M.L.J. 181 : 85 L.W. 1 : A.I.R. 1972 Mad. 185; *Nanji and Company* v. *Jatasankar Dossa,* (1962) 1 S.C.R. 492 : A.I.R. 1961 S.C. 1474; *Kaikhusroo Manekshah Talyarkhan* v. *Gangadas Dwarkadas,* (1936) I.L.R. 60 Bom. 848 : A.I.R. 1936 Bom. 322; *Subbiah Iyer* v. *Pichiai Pillai,* (1970) 1 M.L.J. 132.

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin in A.S. No. 59 of 1973 preferred against the decree of the Court of the District Munsif of Tuticorin in O.S. No. 244 of 1971.

T. Martin, for Appellant.

Raj and *Raj,* for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal has been filed by the 7th defendant in the suit. There are two questions which arise *viz.*, whether Article 61 (*a*) or 61 (*b*) of the Limitation Act of 1963, applies to the present proceedings, and if Article 61 (*b*) is held to apply, whether the suit is within time.

2. The facts are in a short compass. One Madathi Ammal purchased the suit property measuring 1 acre 98 cents for Rs. 800 on 15th July, 1922 under Exhibit B-3. She executed a usufructuary mortgage of this property in favour of her sister Meenakshi Ammal on 26th November, 1928 for Rs. 500 under Exhibit B-1. It was provided in the usufructuary mortgage deed that the time for redemption was by 30th Adi, 1105 M. E. (14th August, 1930) and that if the mortgage was not redeemed by then, the property would become the absolute property of the mortgagee. The mortgage was not redeemed by 14th August, 1930 and the mortgagee Meenakshi Ammal sold the said property on 18th August, 1933 to one Karuppaswami under Exhibit B-4. Karuppaswami executed a gift deed in favour of the 7th defendant on 5th July, 1968. Under Exhibit B-2.

*S.A. No. 991 of 1974. 5*th March,* 1976.

3. Madathi Ammal executed a gift deed on 2nd October, 1970 covering the same property in favour of her son, the plaintiff. She died within a few days thereafter. The plaintiff, filed the suit, after her death, for a declaration that the property belonged to him in view of the discharge of the othi deed, dated 26th November, 1928 and for recovery of possession from the defendants. Defendants 1 to 6 are the legal representatives of Meenakshi Ammal and defendants 7 and 8 are the daughters of the purchaser Karuppaswami.

4. Defendants 1 to 6 remained absent. The 7th defendant in her written statement adopted by the 8th defendant, claimed that she had become the absolute owner of the property under the gift deed in her fiavour by Karuppaswami who had title to the property. She claimed also that the property was in the enjoyment of Karuppaswami and thereafter herself for over the statutory period so as to enable her to perfect her title by adverse possession.

5. The trial Court found that the provision in the mortgage deed, saying that the mortgagee would become the absolute owner after the date fixed for redemption in case the mortgage deed was not redeemed by that date, was a clog on redemption and therefore void ; that the transferee Karuppaswami was only an assignee of the mortgage rights, that Article 61 (*b*) of the Limitation Act applies and that Madathi Ammal knew about the sale deed in favour of Karuppaswami on the date of its execution so that the suit was barred by limitation. It was also held that Karuppaswami had acquired title by adverse possession. In the result, the suit was dismissed.

6. On appeal, the learned Subordinate Judge considered the question as to whether the gift in favour of the plaintiff was true and valid and held that it was true and valid. On the question of limitation, he held that the plaintiff knew about the alienation in favour of Karuppaswami only in 1970 and that therefore the suit was within time. He took further, the view that the plaintiff and his predecessors-in-title were entitled to the benefits of Madras Act IV of 1938 and that the mortgage stood discharged by the enjoyment of the property for a period of more than 30 years. He, therefore, decreed the suit for recovery of possession.

7. In the present appeal by the 7th defendant, learned counsel for the appellant contended that the Court below was wrong in proceeding as if the suit was not barred by limitation. His submission was that the property had been in the enjoyment of the 7th defendant and his predecessor-in-title Karuppaswami since 1933 and that they had perfected title to the property by adverse possession. For the respondent, the submission was that the suit was very much within time in view of Article 61 (*a*) of the Limitation Act or in any event Article 61 (*b*). The attempt of the learned counsel was to show that the plaintiff knew about the transfer only in 1970 and that therefore the suit was very much within time, even if Article 61 (*b*) is held to apply.

8. I shall first consider the question as to whether Article 61 (*a*) applies. That Article relates to a suit by a mortgagor to redeem or recover possession of immovable property mortgaged. The period of limitation is 30 years and the period commences from the date when the right to redeem or recover possession accrues. The predecessor of this Article was Article 148 of the 1908 Act, which provided for a period of 60 years from the date when the right to redeem or recover possession accrued. This is not a suit for redemption, because, according to the plaintiff, the mortgage debt stood automatically discharged by reason of section 9-A (3) of Madras Agriculturists Relief Act (IV of 1938). Section 9-A (1), as it stood at the relevant time, provided that if a usufructuary mortgage was executed at any time before 30th September, 1947, and the mortgagee was in possession of the property mortgaged to him, the mortgagor was entitled to redeem the property notwithstanding that the time, if any, fixed in the mortgage deed for redeeming the mortgage had not arrived. Sub-section (3) of the section provided that where a usufructuary mortgagee was in possession of the property mortgaged to him for an aggregate period

of thirty years or more, then notwithstanding the fact that the time, if any, fixed for redemption has not arrived, the mortgage debt should be deemed to have been wholly discharged with effect from the expiry of the period of 30 years. The result of section 9-A(3) is that the present mortgage would stand discharged by 26th November, 1958. Therefore, there is no question of redemption of the mortgaged property. The plaintiff sought to recover possession of the immovable property mortgaged. According to the plaintiff, there was a period of 30 years from 1958, so that the suit could have been filed till 1988. The case of the plaintiff was that the suit is very much within time. On behalf of the 7th defendant, the submission was that there was a specific Article *viz.*, Article 61 (*b*) relating to recovery of possession of immovable property mortgaged and afterwards transferred by the mortgagee for valuable consideration and that this was such a case, so that it fell within the scope of that provision. The plaintiff's counsel countered this submission by saying that this was a case where the property could be said to have been transferred by the mortgagee and that therefore Article 61 (*a*) alone applied.

9. These rival contentions lead me to consider the question as to what was transferred under Exhibit B-4 in 1933. In other words, the point to be considered is whether the absolute interest in the property was transferred by Meenakshi Ammal or whether there was only an assignment of the usufructuary mortgage in favour of Karuppaswami. In *Nawab Suleman Bahadur* v. *Mirza Fida Hussain Khan*[1], a Bench of the Oudh Chief Court considered the question as to whether the mortgagor could show that the deed, though purporting to be an absolute transfer, was really of the mortgagee's rights. That Court held that extraneous evidence was admissible for the mortgagor to show that what purported at first sight to be a transfer of an absolute title was, in the intention of the parties to the deed, only a transfer of the mortgagee's rights. It has also been pointed out in the judgment that if the deed purported on the face of it to be a sale of absolute rights, then the burden of proving that it was something different lay on the person who asserted it. In view of this decision, it is possible for the plaintiff herein to show that what was transferred under Exhibit B-4 was only the mortgagee's rights. Unless there was a transfer of the absolute title in the mortgaged property, Article 61 (*b*) would not apply.

10. The circumstances relied on for the purpose of showing that there was only a transfer of the mortgagee's right is that the property has been sold by Meenakshi Ammal in favour of Karuppaswami only for a sum of Rs. 425. The property had been purchased by Meenakshi Ammal for a sum of Rs. 800 and she had herself mortgaged the property usufructuarily for a sum of Rs. 500. As the consideration shown under Exhibit B-4 is less than even the mortgage amount of Rs. 500, it was submitted that it could only be a transfer of the mortgagee's rights. The learned counsel for the 7th defendant-appellant submitted that Meenakshi Ammal sold the property after she had become the owner thereof by reason of the provisions in the mortgage deed, and she actually sold only the absolute rights. The consideration was only Rs. 400 as according to the counsel, there was a depression in the value of the properties at the relevant time. On this point, the trial Court has in a way accepted the plea of the 7th defendant, that the consideration shown in the document Exhibit B-4 was a genuine one in view of the economic depression prevailing at that time. The complaint of the learned counsel for the plaintiff-respondent is that there was no evidence in support of the prevalence of economic depression. The prevalence of economic depression is a notorious or historical fact which, in my opinion, can be taken into account by any Court. I do not, therefore, see any reason to discredit the conclusion of the trial Court on this aspect merely because there was no independent oral or documentary evidence to show that there was an economic depression. There is reference to Exhibit B-6, in the judgment of the trial Court, which is the transac-

1. A.I.R. 1945 Oudh 258.

tion of sale of an adjacent property. That property, measuring about 3 acres 86 cents was sold for a sum of Rs. 700 showing that the consideration set out in Exhibit B-4 is not anything unreasonable. But Exhibit B-6, though a registered document, has not been proved by producing the parties thereto. Therefore, it has to be eschewed. Even eschewing Exhibit B-6, I do not think there is anything wrong in the conclusion of the trial Court that what was sold under Exhibit B-4 was the absolute title to the property. The document *prima facie* shows that it is an absolute transfer of the property. I am not persuaded by the circumstances pointed out on behalf of the plaintiff to hold that the transfer was only of the mortgagee's right.

11. If the transfer was of the absolute interest of Meenakshi Ammal, then the material Article would be Article 61 (*b*). In *Dhanalakshmi Ammal* v. *Anthuraj*[1], a Bench of this Court had occasion to consider the point as to which of the provisions of limitation would apply to a given case. It was held that when a mortgagee purporting to be the absolute owner, transferred the property covered by the mortgage, the mortgagor's remedy was to institute a suit for recovery of possession under Article 61 (*b*) of the Limitation Act, 1963, and that the period of limitation was 12 years commencing from the time when the transfer became known to the plaintiff. It was pointed out that the moment the mortgagor came to know about the wrongful transfer, by the mortgagee,of the property covered by the mortgage, his cause of action was to sue for possession at once and that he could not wait for the cause of action for redemption to arise and sue for redemption in a leisurely way allowing the alience from the mortgagee to be in wrongful possession right through in the meantime. In view of this decision, I hold that Article 61 (*b*) is the appropriate Article which applies to the facts here.

12. This takes me to the question as to when the plaintiff or his prodecessors-in-title acquired knowledge about the transaction of sale under Exhibit B-4. Before proceeding to consider the facts on this point, it is necessary to refer to the decision of the Supreme Court in *Nanji and Company* v. *Jatasanker Dossa*[1], to find out the person on whom the burden of proof on this point lies. That case arose under Article 48 of the Limitation Act of 1908. That Article applies to a person having the right to possession of movable property which has been wrongfully taken from him by another. The person who has been wronged can file a suit to recover the said specific movable property or for compensation therefor within three years from the date when he first learns in whose possession it was. The Supreme Court in the course of the judgment in that case, specifically approved a passage in the judgment of Rangnekar, J., in *Kaikhusroo Manekshah Talyarkhan* v. *Gangadas Dwarkadas*[2], appearing at page 860. It had been pointed out by the Bombay High Court that the onus was on the plaintiff to prove that he first learnt within three years of the suit and that the property which he was seeking to recover was in the possession of the defendant. If he proved these facts, then to succeed in the plea of limitation the defendant had to prove that the fact that the property was in his possession became known to the plaintiff more than three years prior to the suit. This passage demonstrates the shifting nature of the burden and as to when it shifts. A Bench of this Court, in *Subbiah Iyer* v. *Pichiar Pillai*[3], considered the same problem in relation to Article 134 of the Limitation Act of 1908, which corresponds to Article 61 (*b*) of the present Limitation Act. It was pointed out in the said case also that the burden was a shifting one and that it was, however, for the plaintiff to show a *prima faci* case that the cause of action was not barred by limitation.

13. I have, therefore, to examine whether the plaintiff has proved *prima fa ie* that he and his predecessors-in-title knew about the transfer under Exhibit B-4 within the period of limitation.

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1. (1972) 2 M.L.J. 181 : 85 L.W. 1 : A.I.R. 1972 Mad. 185.

1. (1962) 1 S.C.R. 492: A.I.R. 1961 S.C. 1474.
2. (1936) I.L.R. 60 Bom. 848: A.I.R. 1936 Bom. 322.
3. (1970) 1 M.L.J. 132.

14. According to the plaintiff, he came to know of the transfer in favour of Karuppaswami, only after the issue of the suit notice in 1970, and in his oral evidence, he has stated that the property was in the enjoyment of Meenakshi Ammal and after her death, of her two sons. After the sons died, according to the witness, their respective wives and children were in enjoyment. He had also stated that he heard about the property having been transferred in favour of defendants 7 and 8. In his cross-examination, at one stage, he stated that he took out an encumbrance certificate with reference to this property and had filed it as an Exhibit in this case. At a latter stage he stated that he had not taken any encumbrance certificate and that he knew about the transfer. He would also say that he did not issue notices to defendants 7 and 8; only because the property was in the enjoyment of defendants 1 to 6 being the heirs of Meenakshi Ammal. Learned counsel for the appellant criticised this evidence by saying that it was only vague and that he could not say as to when the witness acquired knowledge about the transfer of the property. It was stated that the witness has given out that he knew about the enjoyment of the property by Meenakshi Ammal and her heirs and that this could not have been accepted by the Court, as under the document of usufructuary mortgage, which had never been redeemed, the property could only have been in the enjoyment of the usufructuary mortgage and her transferees. On this point, the trial Court has not accepted the evidence of P.W. 1, the plaintiff. The lower appellate Court has, however, believed his evidence. Ordinarily, on a question of fact, I would be bound by the appreciation of evidence made by the lower appellate Court. But, in view of the fact that the Courts below have differed in the appreciation of evidence, I think it necessary and proper to examine as to how far P.W. 1 was properly believed by the lower appellate Court. It is he who has come forward with this suit for recovery of possession of the property. He has necessarily to show that he knew about the transfer of the property only in 1970. Nowhere in his evidence has he stated as to whether Madathi Ammal knew about the transfer or not. No doubt, from the fact that she gifted the property in favour of the plaintiff on 2nd October, 1970, one could draw an inference that Madathi Ammal proceeded on the basis that she had title to the property. But, in order to succeed in the plea that the suit is within time, the plaintiff has necessarily to establish that he and his predecessors-in-title had no knowledge of the transfer beyond the statutory period. In the absence of any statement to show that Madathi Ammal never knew about the transfer when she transferred the property in his favour, I am unable to accept his evidence. Further he has not stated from whom he obtained for the first time knowledge about the transfer of the property under Exhibit B-4. The property is situate in the village in which both Madathi Ammal and Meenakshi Ammal were living. It is in evidence that Meenakshi Ammal was living 50 feet away from the residence of Madathi Ammal. It is difficult to believe that a transaction of sale by Meenakshi Ammal was such a guarded secret in the whole village as not to have been available to Madathi Ammal during the whole of her lifetime. The absence of knowledge of what happened to the property among unsophisticated villagers is such as to draw too much on our credulity. Kist receipts have been produced to show that Karuppaswami was paying kist for the property since 1965. Learned counsel for the plaintiff vehemently contended that no kist receipts have been produced for the period from 1933 till 1965. It is, however, not his case that anybody else had paid the kist or that anybody else was in actual possession of the property between 1933 and 1965. In these circumstances, the fact that Karuppaswami was in possession of the property right upto the date of gift in favour of the 7th defendant in 1968 has to be accepted. Therefore, the version of the 7th defendant that the property was right through in the enjoyment of Karuppaswami and thereafter of himself, was rightly believed by the trial Court.

15. Article 61 (*b*) applies to a case where the mortgagor sues for possession of the property mortgaged which was

afterwards transferred by the mortgagee for valuable consideration. The period of limitation is 12 years from the date when the transfer became known to the plaintiff. As I have already observed, the plaintiff has not shown that he or his predecessor-in-title *viz.*, Madathi Ammal knew about the transfer only within a period of 12 years. The suit is, therefore, clearly barred by the provisions of Article 61 (*b*) of the Limitation Act.

16. In the result, the suit was rightly dismissed by the trial Court. The appeal is therefore allowed. There will be no order as to costs. No leave. The money already deposited towards mesne profits will be refunded by the Court, or if it has been withdrawn, it will be paid back by the plaintiff into Court so as to enable the 7th defendant to withdraw the same.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

A. K. Srinivasa Naidu *Appellant**

v.

S. Jayarama Reddiar Firm by its registered partner, S. Jayarama Reddiar *Respondent.*

Sale of Goods Act (III of 1930), sections 61 (2) and 62—Interest on price of goods—Absence of contract to the contrary—Claim on basis of usage—Claim negatived—Interest when awardable under Interest Act.

A seller is entitled to the award of interest on the price of the goods sold provided there was no contract to the contrary as between himself and the buyer. This liability on the part of the buyer to suffer interest is a statutory liability arising under section 61 (2) of the Sale of Goods Act. [*Para.* 7.]

The concept of an "usage" has a special significance, as it is to be understood as "custom" which is often pleaded in common law litigations. To establish custom, there should be such clinching and appealing material for the Court to support the case of the litigant to propound such a custom. Usage and custom are often pleaded, but not proved. That proof of such usage could easily be negatived or falsified by the conduct of the parties themselves, is an accepted principle. [*Para.* 7.]

In the absence of a contract to the contrary, the provisions of the Interest Act would come to the rescue of the creditor, whereby he could claim interest at 6% per annum on the net debt due provided he makes a demand for that purpose. [*Para.* 9.]

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore in Original Suit No. 738 of 1968.

R. Sukantharaj, P. Jyothi Mani and *M. Satyamoorthy*, for Appellant.

B. Lakshminarayana Reddy and *S. Muthuramalingam*, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The defendant is the appellant. The plaintiff, on the strength of dealings in cotton trade between himself and the defendant, between December of 1961 and June of 1967, claimed the suit amount as per a statement of account, which consists of two parts, one a statement of account as reflected in their account books kept in the regular course of business and another account said to be interest account, which was arrived at after calculation by the plaintiff himself. On the basis of the above two said accounts, the plaintiff claimed a sum of Rs. 65,222-77 in all. In paragraph 5 of the plaint he pleaded thus:—

> "Though some of the items are more than 3 years from the date of suit the subsequent receipts are appropriated towards satisfaction of such items. Further by a notice issued on behalf of defendant on 7th November, 1968 through their counsel and signed by defendant also, the defendant had acknowledged his liability and also

* Appeal No. 129 of 1972. 6*th April,* 1976.

> a payment of Rs. 60,000 made by him towards part of dues under Deposit receipts dated 3rd August, 1966 aggregating for Rs. 60,000 issued by and through Vijayakumar Cotton Press to plaintiff. Besides defendant had made part payment towards the same in December, 1965 which are admitted and acknowledged by him. Hence the suit claim is in time. The aforesaid letter of 7th November, 1968 will be filed at the time of hearing."

In the written statement the defendant denied that there was any particular usage or custom to pay interest either compound or simple over all the transactions that had taken place between the plaintiff and the defendant and that he never paid or claimed interest till the date of the suit on the mutual dealings had. He would, in particular, refer to the copy of the accounts given by the plaintiff himself as reflected in his account book and would point out that no interest has been claimed in such accounts as well. The defendant denied that he owed a sum of Rs. 65,222-77. He, however, claimed that he deposited a sum of Rs. 20,000 with the plaintiff and he reserved his right to take separate steps to recover that amount. The question as to whether the deposit of the said amount with the plaintiff is true or not does not arise for consideration in the instant case. The defendant also pleaded that on 15th December, 1965 and 27th December, 1965 he paid sums of Rs. 300 and Rs. 500 to the plaintiff's agent and that he had also paid Rs. 300 on 20th November, 1966. The plaintiff in his reply statement would deny the above three payments and would sustain his pleadings otherwise.

The following issues were framed:—

(1) Whether the payments alleged in the written statement are true ?

(2) Whether the plaintiff is entitled to interest ?

(3) whether the suit is barred by limitation ?

(4) To what relief is the plaintiff entitled ?

2. The learned trial Judge fround that the payments alleged by the defendant in the written statement are not true. On the question whether the suit was barred by limitation, he was invited to render his opinion as to whether the account in question as reflected in the plaintiff's books of accounts could be treated as a mutual, open and current account. On this the learned Judge held that it was not and, therefore, he felt that it was unnecessary to go into the question as to whether the suit is barred or not under Article 14 of the Limitation Act. But on a closer scrutiny of the dealings and the payments respectively made by the parties, he came to the conclusion that the suit is not barred by limitation, as the defendant has paid well within the period of 3 years from the date of the suit an amount towards the suit debt and, therefore, the suit is saved by section 19 of the Limitation Act. On issue No. 2, whether the plaintiff is entitled to interest, the learned trial Judge, on a curious reasoning, but after holding that the interest claimed by the plaintiff is exorbitant, and is also clearly untenable and unjust, found a case for the plaintiff on a memo. of calculation filed by him at the time of the arguments and held that the defendant was bound to suffer the claim for interest to the tune of Rs. 16,401-50. In the result, therefore, he decreed the suit for a sum of Rs. 12,636-71 towards principal and Rs. 16,401-50 towards interest. It is as against this, the present appeal has been filed.

3. In our view, it is not necessary to go into the question whether the account in the instant case is governed by Article 1 of the Schedule to the Limitation Act of 1963 on the foot that it is a mutual open and current account. The learned counsel for the appellant-defendant is unable to show any particular instance whereat the balances have tilted from one side to the other. This tilting of balances at least at one point of time in a regular account is a relevant indicia to accept it as a mutual, open and current account. This not having been done and demonstrated before us, it is not necessary to harp on this aspect of the case to find whether the suit claim is not barred for the reason that the plaintiff's account

should be characterised as a mutual, open and current account.

4. It is, therefore, for consideration whether the contention of the learned counsel for the appellant that the suit is barred by limitation is acceptable or not. Before the filing of the suit the plaintiff gave a notice of demand, Exhibit A-26, dated 28th October, 1968. He claimed a sum of Rs. 62,726-41 as the amount due by the defendant towards the dealings and claimed interest at 12% per annum on the said amount. To this the defendant sent a reply through his counsel which reads as under :

"To 7th November, 1968.

Sri S. R. Sakthivel, M.A.,B.L.,
Advocate,
7/18, State Bank Road,
Coimbatore-18.

Sir,

We are instructed by Sri A. K. Srinivasalu Naidu, residing at 111, N. G. Narayanaswami Street, New Siddapudur, P. N. Palayam Post, Coimbatore, to give the following reply to your notice, dated 29th October, 1968, and received by our client on 6th November, 1968, issued on behalf of Sri Jayarama Reddiar, B.A., M.L.C., Cotton Merchant, 30, Kandhapuram Street, Virudhunagar.

Your client's claim of Rs. 62,726-41 is preposterous and false. Your client has given a statement of account on 31st December, 1965 and as per that statement Rs. 72,986-71 was stated to be due by our client. But in that statement your client has not given credit to amounts of Rs. 300 and Rs. 500 paid on 15th December, 1965 and 27th December, 1965 respectively to your client's agent, A. Andiyappa Thevar. This omission was immediately brought to notice of the agent of your client who promised to rectify it.

Vijayakumar Cotton Press owed our client large sums of money. Out of such amount at the reqeust of your client, our client asked Vijayakumar Cotton Press to issue a Fixed Deposit Receipt aggregating to Rs. 60,000 in partial discharge of our client's dues. Your client has accepted these receipts and a cash voucher was passed to that amount to our client on 20th November, 1966. Rs. 300 was paid in cash to your client's agent. Besides these payments, our client has advanced to your client Rs. 20,000 carrying interest at the rate of 12% per annum. All these amounts have to be adjusted by your client. After adjusting all these amounts it would be found that your client himself owes money to our client.

The claim made in your notice is unsustainable. Please advise your client to settle the mutual claims without resorting to Court.

(*Sd.*)........
Advocate."

It is seen from the expressed recitals in the reply notice that the appellant acknowledged his liability towards the claim made by the plaintiff, though not in full, but at least in part. According to the defendant, he has paid a sum of Rs. 60,000 in partial discharge of his dues to the plaintiff. This by itself is sufficient to bring the recitals made in Exhibit A-26 within the meaning of section 19 of the Limitation Act. This section reads as follows :

"19. Where payment on account of a debt .... is made before the expiration of the prescribed period by the person liable to pay the debt,.... a fresh period of limitation shall be computed 'from the time when the payment was made'."

Undoubtedly, the sum of Rs. 60,000 which as it transpired, was given credit to by the plaintiff on 3rd February, 1966 is a payment made on account of a debt payable to him by the person liable to pay the debt within the meaning of section 19 of the Limitation Act. Therefore this payment towards the debt due, but which has not been solved on the date when Exhibit A-27 was written, is sufficient acknowledgment of liability so as to extend the period of limitation to a further period of three years from the date of such payment. The learned counsel for the appellant does not raise any controversy as to the date on which the said sum of Rs. 60,000 has been credited by the plaintiff in his books. It can, therefore, safely be presumed that the above sum of Rs. 60,000

was paid towards the debt due by the defendant to the plaintiff as on 3rd March, 1966. After giving credit to a sum of Rs. 60,000 the plaintiff arrives at the balance at the end of that year at Rs. 12,686-71. Ultimately he gives credit to a further sum of Rs. 50 and claims the balance of Rs. 12,636-71 as principal in the present suit. Whatever may be the force in the contention of the appellant-defendant as to the claim for interest made by the plaintiff, we are unable to agree with the appellant that the principal amount of Rs. 12,636-71 was not payable by him on the date when the suit was instituted.

5. The next question is whether the plaintiff is entitled to the interest as claimed by him. It is very significant that even in the plaint the plaintiff does not give a break-up of the principal and the interest due. It is equally significant that the account books regularly kept by the plaintiff do not disclose that at any time there was an understanding as between the plaintiff and the defendant to claim interest. It is not in dispute and as a matter of fact it was agreed before us that the ledgers produced in support of the suit claim do not support the claim for interest. But what has been very dexterously done by the plaintiff is he introduced along with the plaint what is known as "interest account". In the interest account he claimed "rasi interest" *i.e.*, interest payable on the price of goods sold and delivered till another supply is made by the plaintiff and the latter supply is again taken into consideration for calculation of interest until another supply is made and so on. Obviously this is a very clever way of claiming not only compound interest, but interest on compound interest. As we said, the plaintiff did not reflect such a claim in his regular books of accounts. But he tried to usher in a self-serving statement of account and called it "an interest account" and claimed a large sum, such as Rs. 52,586-06 as and towards interest payable by the defendant. To this the learned counsel for the appellant takes an objection and contends that the interest as claimed is not only usurious and excessive, but cannot be claimed at all by the plaintiff under any known principle of law. The learned Judge himself finds that the method of calculation adopted by the plaintiff resulting in the claim of Rs. 52,586-06 is an unusual one and such exorbitant claim of interest is clearly untenable and unjust. We agree with him. On the ground that the interest as claimed by the plaintiff is usurious, and indeed unsustainable, we are bound to relieve the defendant from such a claim.

6. The question, however, is whether the plaintiff is entitled to any interest at all. We have already referred to the account books, which are silent about the payment of interest. Even in the notice of demand, Exhibit A-26, the break-up as to the principal amount and the interest amount has not been given. It is only at the time of arguments and that too at the request of the Court, a memo of calculation was filed by the plaintiff, which showed that the plaintiff was calculating interest for each debit at 12 per cent. per annum. Being conscious of the fact that such interest ultimately worked out to Rs. 5,91,856 the plaintiff wanted to generously give counter-interest to the defendant for all the payments made by him and for all the supplies also admittedly made by him in the course of their mutual dealings. On his own showing the interest which was claimed by the plaintiff and as shown in the memo of calculation worked out to Rs. 5,91,856 and the interest towards the credits in favour of the defendant came to about Rs. 5,59,053; the learned Judge was tempted to discover the difference between these two items and by a curious reasoning again reduced the rate per cent to 6 per cent and thereafter found that a sum of Rs. 16,401-50 could be awarded, as interest towards the sum of Rs. 12,636-71. Mr. Lakshminarayana Reddy, the learned counsel for the plaintiff, wants to sustain this claim on the ground that under section 61 (2) of the Sale of Goods Act, he would be entitled to such interest, because there was no contract to the contrary and as the liability to pay interest on the part of the defendant has statutorily arisen under section 61 (2) (*a*) of the Act. The learned counsel for the appellant however would show that in the absence of any contract or understanding in the course of dealings as between the parties to pay interest by one to the other, the claim for interest is unsustainable.

7. It is no doubt true that a seller is entitled to the award of interest on the price of the goods provided there was no contract to the contrary as between himself and the buyer. Obviously, therefore, this liability on the part of the buyer to suffer interest is a statutory liability arising under section 61 (2) of the Act. We shall, of course, consider the dealings of the parties presently and the inferences that have to be drawn by reason of such course of dealings. To this entitlement of the seller to ask for interest from a Court in which he has filed a suit for the recovery of price, there is a marked exception made in section 62 of the Sale of Goods Act. That section reads as under :—

> " 62. Exclusion of implied terms and conditions.-Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract."

Mr. Lakshminarayana Reddy would rely upon section 62 and say that there was an usage as between the parties for the payment of interest. The concept of an usage has a special significance, as it is to be understood as " custom" which is often pleaded in common law litigations. To establish custom, there should be such clinching and appealing material for the Court to support the case of the litigant to propound such a custom. Usage and custom are often pleaded, but not proved. That proof of such usage could easily be negatived or falsified by the conduct of the parties themselves, is an accepted principle. The instant case before us is one such a case.

8. The ledgers produced by the plaintiff showing the course of dealings between himself and the defendant during the years 1961 to 1967 admittedly do not contain any entry touching on the liability on the part of the defendant to pay interest. If the usage, which is now put in the forefront by Mr. Reddy is true, then there is no explanation as to why the plaintiff did not include the claim for interest in his regularly kept account books and treat it as his taxable income. Again the dealings between the plaintiff and the defendant obviously are mutual. The plaintiff was sometimes supplying goods to the defendant and the defendant in turn was supplying goods to the plaintiff. That such supplies and dealings were almost of equal weight is seen from the fact that in the memo. of calculation filed by the plaintiff the ultimate interest to which the plaintiff was entitled to is shown as Rs. 5,91,856 whereas the interest which he should suffer in favour of the defendant was shown as Rs. 5,59,053. For the purpose of appreciation of the point we can reasonably take it that the dealings as between the plaintiff and the defendant were on a par and almost on a level. Probably it is this significant feature in the transactions and in the course of dealings which prompted both the parties not to claim any interest by one from the other. On the ground that the plaintiff's accounts do not reflect any such liability to pay interest, and also on the ground that the implied understanding possibly between the parties could be not to project such a claim by one against the other, we are inclined to accept the case of the defendant that the course of dealings between the parties negatives the liability to pay interest towards the transactions between the parties. This is provided for under section 62 of the Sale of Goods Act. The liability to pay interest is not express in this case. Mr. Reddy himself puts it on the ground that it is assumed by implication of law and particularly under section 61 (2) (*c*) of the Sale of Goods Act. Such implied legal liability could be negatived by the course of dealings between the parties. We have held that the course of dealings between the plaintiff and the defendant clearly negatives the claim now put forward by the plaintiff on the ground that a huge sum is payable towards interest. For the foregoing reasons, we are of the view that the sum claimed by the plaintiff as and towards interest is not payable by the defendant. We have expressed ourselves that the learned Judge was wrong in having adopted methods unknown to law to afford relief to the plaintiff in the matter of the award of the interest in his favour. The memo. of calculation filed at the time of the arguments is but a self-serving document produced by the plaintiff to subserve its own interest. Such self-

serving document cannot be the cause of action for the grant of a relief by a Court of justice. We, therefore, disagree with the Court below that the plaintiff would be entitled to a sum of Rs. 16,401-50 towards interest.

9. But the question is whether the plaintiff is not entitled to any interest at all. We do not think so. Even in the absence of the contract to the contrary, the provisions of the Interest Act would come to the rescue of the creditor, whereby he could claim interest at 6% per annum on the net debt due provided he makes a demand for that purpose. It is not in dispute that the plaintiff made such a demand under Exhibit A-26. It, therefore, follows that under the said Act the plaintiff would be entitled to interest on the suit claim, which is not in dispute before us, *viz.*, Rs. 12,636-71 at 6% per annum from the date of demand *viz.*, 28th October, 1968 to the date of suit and thereafter on the decreed amount at the same rate till date of realisation. The plaintiff would be entitled to proportionate costs.

10. The appeal is partly allowed. But in the circumstances of the case there will be no order as to costs on the balance disallowed.

R.S. ——*Appeal partly allowed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*P. S. Kailasam, C.J., G. Ramanujam and V. Balasubramanyan, JJ.*

Bangaru Chettiar .. *Appellant**

v.

San Basha Sahib and another .. *Respondents.*

Tamil Nadu Agriculturists' Reliefs Act (IV of 1938), sections 23-A, 23-B and 23-C—Section 23-C introduced by the Amending Act VIII of 1973—Scope—Property of judgment-debtor sold in execution on 24th January, 1973 after the coming into force of the Amending Act—Section inapplicable.

Sections 23-A, 23-B and 23-C of Tamil Nadu Act IV of 1938 came to be introduced by Amending Acts XXIII of 1948, XXIV of 1950 and Act VIII of 1973 respectively, enabling Courts to set aside sales of immovable property at the instance of the agriculturist-debtors in order to give them the benefit of the relative Amending Act. Section 23-A enables the Court to set aside sales of immovable property belonging to a judgment-debtor held on or after 30th September, 1947 if the sale had not been confirmed before the commencement of the Act or 90 days had not elapsed from the confirmation of the sale at such commencement if the judgment-debtor applied to the Court within 90 days of such commencement or the confirmation of the sale whichever was later. Section 23-B merely extended the application of section 23-A to sales held on or after 25th April, 1950 to ensure that agriculturist-debtors got the benefit of the Amending Act XXIV of 1950. Similarly section 23-C was introduced by the Amending Act VIII of 1973 enabling the Court to set aside sales held on or after 1st March, 1972 if the sale had not been confirmed before the publication of that Act or 90 days had not elapsed from the confirmation of the sale at such publication.

[*Para.* 4.]

Section 23-C is in two parts, the first part dealing with the nature of the sales covered by the section and the latter part dealing with the limitation for filing an application for setting aside those sales. The first part refers to sales held on or after 1st March, 1972 which have not been confirmed before the commencement of the Amending Act of 1948 or ninety days have not elapsed from the sale at such commencement On the wording of the section it can be applied to sales which have not been confirmed before the commencement of the Amending Act or ninety days have not elapsed at the commencement. Though a sale held after the commencement of the Act will also satisfy the requirement set out in that section, as in respect of such a sale there is no question of confirmation before the Act, to give such an unrestricted meaning to the words used in section 23-A would be to attribute to the legislature a wholly whimsical and way-

*A.A.A.O. No. 176 of 1974.

30th April, 1976.

ward intention. Though section 23-C, if literally construed, is wide enough to include sales that had taken place after the Act, there being no words limiting the scope of the section, still, having regard to the object with which the section was introduced its operation would be restricted to sales held before the Act. Though the section is not happily worded the intention appears to be clear. The reference to sales not confirmed at the commencement of the Act or ninety days have not elapsed at such commencement in the section clearly indicates that the section should be restricted to sales held before the Act. If the section is intended to have a wider operation so as to apply to sales held after the Act, then reference to the factum of confirmation is quite unnecessary and it would have been sufficient to say that all sales after 1st March, 1972 can be set aside at the instance of the judgment-debtor. [*Para.* 14.]

Section 23-C also uses the same language as section 23-A and on the wording of the section it is applicable to sales not confirmed before the publication of the Act or ninety days have not elapsed from the confirmation at such commencement. It is true, if the legislature can think of setting aside sales held before the commencement of the Act it can also provide for setting aside the sales held after the commencement of the Act. if the sales have taken place without reference to the benefit which the judgment-debtor has got under the provisions of the Act. If such was the intention, the words "sale has not been confirmed before the publication of the Act in the Tamil Nadu Government Gazette or ninety days have not elapsed from the confirmation of the sale or from the foreclosure" would be purposeless. In construing the scope of the first part section 23-C it is not possible to bring in aid the latter part dealing with limitation. The latter part cannot enlarge the scope of the first part. [*Para.* 15.]

The main intention behind sections 23, 23-A, 23-B and 23-C is to give an opportunity to the agriculturist-debtor to have his debt scaled down. That object is achieved in cases where the sale is held after the Act by the debtor raising his plea that he is entitled to the benefit of the Principal Act as amended from time to time, even before the sale takes place. In such cases there is no necessity for the agriculturists to wait till the sale takes place and then apply for setting aside the same, as they have an opportunity to have the debt scaled down even before the sale. It is only in respect of sales held before the coming into force of the Act, which had been confirmed or await confirmation an opportunity has to be given to the agriculturist to have his decree debt scaled down and to have the sale set aside if the sale has taken place for recovery of any amount in excess of the debt as scaled down. In respect of sales held after the Act, proceedings in execution should have been pending at its commencement or initiated later. In respect of such proceedings the Act gives a sufficient remedy by way of sections 19 and 20 to see that the sale does not take place before the debt is scaled down. After giving such an opportunity to see that execution sale is not held without scaling down the debt, it appears to be quite unnecessary and meaningless to give another or further opportunity to the judgment-debtor to have the sale set aside on the ground that the decree debt has not been scaled down under section 19. Such an opportunity is necessary only in cases where the benefits of the Act could not be claimed and the decree debt scaled down before the sale is held. If such were the intention of the legislature, then it is unnecessary for the legislature to provide a restriction with reference to the date of commencement of the Act or the date of confirmation of sale. If the sales after the Act are also intended to be set aside the legislature would not have fixed a time-limit for application with reference to the date of commencement of the Act or of the confirmation. [*Para.* 16.]

The Legislature brought in section 23-A by Madras Act XXIII of 1948, 23-B by Madras Act XXIV of 1950 and 23-C by Madras Act VIII of 1973 for setting aside sales that had taken place after 30th September, 1947, 25th April, 1950, and 24th January, 1973 respectively

with a view to enable the agriculturist-debtors to have the benefit of the corresponding amending Acts. The introduction of sections 23-A, 23-B and 23-C by the various amending Acts would be quite unnecessary if section 23 can be made applicable to all sales after the commencement of the principal Act. The fact that on each occasion when a benefit is conferred on an agriculturist under a statute a new provision for setting aside sale is made shows that earlier provision for setting aside sales are intended to have a limited application. The intention of the legislature in enacting sections 23-A, 23-B and 23-C appears to be to enable the judgment-debtors to set aside sales held hurriedly just before the introduction of each of the amending Acts conferring certain benefits on the agriculturist-debtors. If the provisions in sections 23, 23-A and 23-B are construed as applicable to all sales held after the relevant Acts, then there is no necessity for a separate provision like section 23-C. Having regard to all these circumstances, section 23-C cannot be invoked in respect of sales that had taken place after the publication of Act VIII of 1973.

[*Para.* 17.]

Section 23-C cannot be invoked to set aside the sale held in the instant case, though it is open to the judgment-debtor to raise the plea that the decree debt had been scaled down under section 19 of the Act at the stage of confirmation of sale. [*Para.* 20.]

Cases referred to :—

Dharmarajan v. *Nagalinga Kandiar*, (1972) 2 M.L.J. 34; *Doraiswamy Gounder* v. *Parayammal*, (1976) 1 M.L.J. 11 : A.I.R. 1976 Mad. 66; *Seshayya* v. *Venkataramayya*, (1941) 2 M.L.J. 309: 54 L.W. 228 : A.I.R. 1942 Mad. 271; *D. Ramakotayya* v. *T. Nagi Reddi*, (1957) 1 An.W.R. 142 : (1957) An.L.T. 26; *Kumaraswami Pillai* v. *Thiruvengadatha Aiyangar*, (1939) 2 M.L.J. 308: 49 L.W. 762 : I.L.R. (1939) Mad. 886: A.I.R. 1939 Mad. 613; *Sethurayar* v. *Karuppayammal*, (1945) 2 M.L.J. 535: 58 L.W. 632 : A.I.R. 1946 Mad. 158; *Lakshminarasimha Rao* v. *Ganapati Munayya*, (1940) 2 M.L.J. 234 : 52 L.W. 244 : A.I.R. 1940 Mad. 825.

Appeal against the order of the Court of the Additional Subordinate Judge, Cuddalore dated 2nd September, 1974 and made in C.M.A. No. 36 of 1974 (E.A. No. 2692 of 1973 in O.S. No. 703 of 1970, District Munsif Court, Cuddalore).

R. S. Venkatachari, for Appellant.

T. R. Mani for *K. Sarvabhauman* and *K. Sampath*, for Respondents.

The Judgment of the Court was delivered by

Ramanujam, J.—The question that arises for our consideration in this case is whether the benefit of section 23-C of the Tamil Nadu Agriculturists' Relief Act, 1938 introduced by the Amending Act VIII of 1973 could be availed of by a judgment-debtor whose property has been sold after 24th January, 1973, the date of coming into force of the said amending Act. This question has been referred to us by Mohan, J. in view of the divergent opinions now prevailing on the said question.

2. The respondents herein obtained a decree against the appellant herein in O.S. No. 703 of 1970 on the file of the District Munsif, Cuddalore and in execution of that decree applied for the sale of the judgment-debtor's properties in E. P. No. 1187 of 1973. The appellant filed an application under section 20 of the Act IV of 1938 for stay of execution of the decree so as to enable him to apply under section 19 of the Act for scaling down the decree-debt. In that application stay of execution was ordered on 28th April, 1973. The appellant thereafter filed an application under section 19 on 28th June, 1973 in I.A. No. 2437 of 1973. On the ground that the appellant had not filed an application under section 19 exactly within 60 days, the executing Court proceeded with the execution and the judgment-debtor's properties were actually sold on 24th September, 1973 notwithstanding the pendency of the application under section 19. The sale has not, however been confirmed as yet. The appellant's application under section 19 for scaling down the decree-debt, was disposed of on 15th October, 1973 and

the decree-debt had in fact been scaled down. The appellant, thereafter filed E. A. No. 2692 of 1972 under section 23-C in E.P. No. 1187 of 1973 on 22nd October, 1973 to have the sale set aside, but the said application came to be dismissed on 21st December, 1973 on the ground that the sale having taken place after 24th January, 1973, the date of the coming into force of the Amending Act VIII of 1973, section 23-C cannot be invoked. An appeal therefrom was also dismissed by the Sub-Court, Cuddalore, following the decision in *Seshayya* v. *Venkataramayya*[1]. The matter was taken to this Court in C.M. S.A. No. 176 of 1974. Mohan, J., who heard the said appeal in the first instance, having regard to the conflict of judicial opinion on the scope and interpretation of section 23-C referred the case to a Full Bench.

3. Tamil Nadu Agriculturists' Relief Act IV of 1938 was enacted in order to provide relief to indebted agriculturists in the State. The said Act has been amended from time to time and the latest amendment was by Act VIII of 1973 which came into force on 24th January, 1973. By virtue of the said amending Act all debts payable by the agriculturists as on 1st March, 1972 shall be scaled down in accordance with the provisions of Chapter II of the Principal Act as amended. Sections 7 and 8 provide for the scaling down of all debts payable by an agriculturist as on 1st March, 1972. Section 12 prescribes interest at 9 per cent for old loans incurred before 1st March, 1972 which had been scaled down and section 13 prescribes interest at the rate of 9 per cent. for the debts incurred after 1st March, 1972. Section 9-A deals with usufructuary mortgages. Chapter IV deals with procedure in regard to pending suits and execution petitions. Section 19 occurring in that Chapter provides for amendment of decrees passed prior to 1st March, 1972 by scaling down the decree debt. Section 20 enables the agriculturist debtors to apply for stay of the execution of the decrees until the Court which passed the decree has disposed of an application under Section 19. The proviso to section 20 says that if a judgment-debtor who had obtained stay of execution under that section does not apply under section 19 within sixty days, the decree can be executed as it stands. Then comes section 23 which is as follows:

> "Where in execution of any decree any immovable property, in which an agriculturist had an interest, has been sold or foreclosed on or after the 1st October, 1937, then notwithstanding anything contained in the Indian Limitation Act, 1908 or in the Code of Civil Procedure 1908 (Act V of 1908), and notwithstanding that the sale has been confirmed any judgment-debtor claiming to be an agriculturist entitled to the benefits of this Act, may apply to the Court within 90 days of the commencement of this Act to set aside the sale or foreclosure of the property, and the Court shall, if satisfied that the applicant is an agriculturist entitled to the benefits of this Act, order the sale or foreclosure to be set aside and thereupon the sale (or foreclosure) shall be deemed not to have taken place at all."

Section 23 which is really an extension of section 7 enables the judgment-debtor to apply for setting aside a sale held on or after 1st October, 1937 even if it has been confirmed, within 90 days of the commencement of the Act IV of 1938.

4. Sections 23-A, 23-B and 23-C came to be introduced by Amending Acts XXIII of 1948, XXIV of 1960 and VIII of 1973 respectively, enabling the Courts to set aside sales of immovable property at the instance of the agriculturist debtors in order to give benefit of the relative amending Act. Section 23-A enables the Court to set aside sales of immovable property belonging to a judgment-debtor held on or after 30th September, 1947, if the sale has not been confirmed before the commencement of the Act or 90 days have not elapsed from the confirmation of sale at such commencement if the judgment-debtor applies to the Court within 90 days of such com-

1. (1941) 2 M.L.J. 309 : 54 L.W. 228: A.I.R. 1942 Mad. 278.

mencement or the confirmation of sale whichever is later. Section 23-B merely extended the application of section 23-A to sales held on or after 25th April, 1950 to ensure the agriculturist debtors get the benefit of the amending Act XXIV of 1950. Similarly section 23-C has been introduced by amending Act VIII of 1973 enabling the Court to set aside sales held on or after 1st March, 1972 if the sale had not been confirmed before the publication of Act VIII of 1973 or 90 days have not elapsed from the confirmation of sale at such publication. The relevant portion of section 23-C is extracted below:

> "23-C. *Power of Court to set aside sales of immovable property in certain cases.*—Where in execution of any decree, any immovable property in which any person entitled to the benefits of the Tamil Nadu Agriculturists Relief (Amendment) Act, 1972, had an interest has been sold or foreclosed on or after the 1st March, 1972 and the sale has not been confirmed before the publication of the said Act in the Tamil Nadu Government Gazette, or ninety days have not elapsed from the confirmation of the sale or from the foreclosure at such publication then, notwithstanding anything contained in the Limitation Act, 1963 (Central Act XXXVI of 1963) or in the Code of Civil Procedure, 1908 (Central Act V of 1908) and notwithstanding that the sale has been confirmed any judgment-debtor claiming to be entitled to the benefits of the said Act, may apply to the Court within ninety days of such publication or of the confirmation of the sale, whichever is later, to set aside the sale or foreclosure of the property, and the Court shall if satisfied that the applicant is a person entitled to the benefits of the said Act, order the sale or foreclosure to be set aside and thereupon the sale or foreclosure shall be deemed not to have taken place at all."

5. It is on the interpretation of section 23-C there is cleavage of judicial opinion. One view is that section 23-C can be invoked only in respect of sales held on or after 1st March, 1972 but before the publication of the said Act and that it will not apply to sales held after 24th January, 1973, the date of publication of the Act. The other view is that it applies to all sales held on or after 1st March, 1972 and that there is no scope for restricting its operation to sales held between 1st March, 1972 and 24th January, 1973, the date of publication of the Act VIII of 1973.

6. In *Dharmarajan* v. *Nagalinga Kandiar*[1], N. S. Ramaswami, J. had expressed the view that it applies only to sales held after 1st March, 1972 but before the publication of the Act VIII of 1973, that the words "the sale has not been confirmed before the publication of the said Act in the Tamil Nadu Government Gazette" or 90 days have not elapsed from the confirmation of the sale or from the foreclosure at such publication" occurring in the section clearly indicate that the sale which is sought to be set aside should have taken place prior to the publication of Act VIII of 1973 as then alone the question of sale not having been confirmed before the publication of the Act, or 90 days having not elapsed from such confirmation would arise. In *Doraiswami Gounder* v. *Parayammal*[2], Mohan, J., followed the above decision of N. S. Ramaswami, J. and held that the sale in that case having taken place on 13th February, 1973 after the coming into force of Madras Act VIII of 1973 on 24th January, 1973 section 23-C cannot be invoked to set aside such a sale. Natarajan J., in *Ambujammal* v. *Vedavalli and others*[3] has also taken the same view. This view finds support from the decision of a Division Bench of this Court in *Seshayya* v. *Venkataramayya*[4], rendered under section 23 of the Act and a decision of Viswanatha Sastri, J. in *D. Ramakotayya* v. *T. Nagi Reddi*[5], rendered under section 23-A of the Act.

7. A different view has been expressed by Paul, J. in *Thirukamu. Reddiar* v.

1. (1972) 2 M.L.J. 34.
2. (1976) 1 M.L.J. 11: A.I.R. 1976 Mad. 66.
3. C.M.A. No. 230 of 1974.
4. (1941) 2 M.L.J. 309 : 54 L.W. 228.
5. (1957) 1 An.W.R. 142: (1957) An.L.T. 26.

Venkataswami Reddiar and another[1], and his reasoning is this:

> "There is nothing in that section which would show that the benefits conferred by that section would not be available to a judgment-debtor if the sale is held after the Act came into force. No doubt the words "has been sold or foreclosed" would indicate that the sale must have been a *fait accompli* before the Act came into force. But those words are qualified by the subsequent words "on or after the 1st March, 1972". This would show that if the sale had been held before 1st March, 1972 section 23-C cannot be invoked. This does not mean that only in respect of sales held after 1st March, 1972 and before 24th January, 1973 the date on which the Act came into force, applications under section 23-C would lie. A reading of the entire section would certainly show that section 23-C was intended to be applicable even in cases of sales held after the commencement of the Act."

Sethuraman J. in *Nagalakshmi Ammal* v. *Govindaswami Pillai and another*[2] has also taken the same view, after considering the earlier decision of the Division Bench in *Seshayya* v. *Venkataramayya*[3]. In that case the sale took place on 26th March, 1973 but before the confirmation of the sale the judgment-debtor had applied for setting aside the sale under section 23-C on the ground that he had applied under section 19 to scale down the decree. The application under section 23-C for setting aside the sale on the ground that an application for scaling down the decree debt is pending was allowed by the executing Court but on appeal the order setting aside the sale was set aside on the ground that section 23-C has no application. On a further appeal by the judgment-debtor, Sethuraman, J. allowed the appeal observing:

> "On a plain reading of this provision it comes for application where any immovable property, in which any person entitled to the benefits of the amending Act had an interest, had been sold in execution of a decree on or after the 1st March, 1972. This condition is satisfied in the present case because the sale was held after 1st March, 1972 *i.e.*, on 26th March, 1973. If the sale had been confirmed after 1st March, 1972 and before the publication of the amending Acts then the debtor claiming benefit, under the Act could apply for setting aside the sale. Another contingency was also contemplated *viz.*, of the judgment-debtor applying within ninety days from the confirmation of the sale".

1. C.M.A. No. 70 of 1974.
2. C.M.S.A. No. 130 of 1974.
3. (1941) 2 M.L.J. 309 : 54 L.W. 228.

The learned Judge distinguished the decision in *Seshayya* v. *Venkataramayya*[1], on the ground that it dealt with section 23 which was somewhat differently worded and that cannot be applied to interpret the scope of section 23-C which is differently worded, and which clearly contemplates a case of an application for setting aside the sale being made within 90 days of its confirmation which was not the case in section 23.

8. Thus one point of difference is on the question whether the decisions rendered with reference to sections 23 and 23-A will govern the interpretation of section 23-C.

9. Wadsworth and Patanjali Sastri, JJ. in *Seshayya* v. *Venkataramayya*[1], had held that section 23 of Madras Act IV of 1938 had no application to sales held after the Act came into force. In that case the sale was held on 29th March, 1938, just a week after the Act came into force. It was contended on behalf of the judgment-debtor that section 23 applied in terms of all sales held on or after first October, 1937, the only future or outer limit expressly laid down in the section being the date within which the application is to be made which is within 90 days of the commencement of the Act and that within the said 90 days any judgment-debtor entitled to the benefit of the Act may apply to set aside the sale even though the sale was

1. (1941) 2 M.L.J. 309 : 54 L.W. 228: A.I.R. 1942 Mad. 278.

held after the Act came into force. This contention was rejected by the Bench for two reasons. (1) Having regard to the three verbs used in that section namely "had an interest", "has been sold" and "may apply", the section should be taken to have been drafted with reference to the point of time at which the Act came into force and therefore the section should be taken to relate only to sales held between 1st October, 1937 and the date of commencement of the Act; (2) There are alternative provisions found in the Act to relieve agriculturists whose properties have been brought to sale after the commencement of the Act and it is therefore most unlikely that the Legislature contemplated the application of section 23 to sales held after the commencement of the Act.

10. In *Ramakottayya* v. *T. Nagi Reddi*[1], the scope of section 23-A came up for consideration. In that case the judgment-debtor's property was sold on 4th April, 1949 long after 25th January, 1949 the date of commencement of Madras Act XXIII of 1948 and the application for setting aside the sale under section 23-A was filed on 22nd April, 1949. The said application was opposed by the auction-purchaser on the ground that section 23-A cannot be invoked for setting aside that sale. It was contended on behalf of the judgment-debtor that section 23-A applies to all sales of properties of agriculturists held after 30th September, 1947, that if the intention of the Legislature was to restrict the application of section 23-A to sales held between 30th September, 1947 and the date of commencement of Act XXIII of 1948, a specific provision would have been made to that effect, and that therefore, the words, of section 23-A being clear and wide, its scope and application cannot be curtailed with reference to any supposed intention of the Legislature. Viswanatha Sastri, J., rejected the said contention on the ground that such a construction of section 23-A would not only lead to palpable injustice and anomaly but will also have the effect of rendering futile the execution proceedings and Court sales duly held under the provisions of the Code of Civil Procedure and that therefore it is permissible to have recourse to construction by implication and to draw inference or supply obvious omissions in order to avoid an abrogation of the provisions of the Code of Civil Procedure with regard to execution sales and palpable injustice to third parties. The learned Judge observed:

"It is clear from the provisions of section 23-A read as a whole that some restriction must be put upon the literal meaning of the general words and the character and extent of the restriction could easily be ascertained from the context. Section 23-A refers to sales held on or after 30th September, 1947 but the right to apply under the section is confined to cases where the sale has not been confirmed before the commencement of Act XXIII of 1948 or 90 days have not elapsed from the confirmation of the sale at such commencement. The reference to the confirmation of the sale before the commencement of the Act or within 90 days of such commencement indicates that it was only sales held before the Act that were within the contemplation of the Legislature. The date 30th September, 1947 was perhaps chosen because the legislative proposals which subsequently became Act XXIII of 1948 had been mooted by that date. The reason for ignoring confirmation of sales made before the commencement of the Act or within 90 days of such commencement was apparently to afford relief to debtors where execution proceedings had been hurriedly rushed through by decree-holders in view of the impending legislation. Whatever be the reason, there is no justification for ignoring the provisions of section 23-A relating to confirmation of sales in arriving at a conclusion as to whether Court sales held after the coming into force of Act XXIII of 1948 fell within the purview of section 23-A. To accept the wide and unrestricted meaning sought to be put upon the words of section 23-A by the appellant would be to attribute to the Legislature

1. (1957) 1 An.W.R. 142 : (1957) An.L.T. 26.

a wholly whimsical and wayward intention."

11. There cannot be any dispute that sections 23, 23-A, 23-B and 23-C are all intended to serve a similar object and purpose. Each of these sections was introduced whenever a new benefit was granted to an agriculturist debtor. The obvious purpose is to see that execution sales hurriedly rushed through in anticipation of the legislation conferring that benefit are reopened. Therefore the above provisions which are intended to serve a similar purpose should receive similar interpretation. Therefore, the decisions under sections 23 and 23-A cannot altogether be ignored while interpreting section 23-C.

12. It is true, the decision in *Seshayya* v. *Venkataramayya*[1], dealt with section 23 which was somewhat differently worded than section 23-A or section 23-C and the Legislature should be taken to be aware of the said decision while enacting section 23-A by Amending Act XXIII of 1948 and section 23-C by Amending Act VIII of 1973 with slightly different language. The decision in *Ramakottayya* v. *T. Nagi Reddi*[2], however dealt with section 23-A which is practically identical with section 23-C. Even though section 23-A is somewhat differently worded than section 23 the reasoning adopted in the latter case is substantially the same as in the former. This is due to the fact that sections 23 and 23-A being intended to serve a similar purpose notwithstanding the difference in language they have to be interpreted in the light of the basic object sought to be achieved by enacting them.

13. It is contended by the learned counsel for the respondent that the two reasons given in the former decision for limiting the application of section 23 to sales held before the commencement of the principal Act equally applied to the interpretation of section 23-C as well. It is also pointed out that Viswanatha Sastri, J., dealing with section 23-A which used more or less the same language as section 23-C without reference to the earlier decision, gave the same reasoning for limiting the operation of section 23-A to sales held before the commencement of Madras Act XXIII of 1948, that the learned Judge felt that though section 23-A if literally understood would apply to all sales held on or after 20th September, 1947 some restrictions on the literal meaning of the general words have to be ascertained from the context.

14. A close reading of section 23-C indicates that it is in two parts, the first part dealing with the nature of the sales that are covered by the section and the latter part dealing with the limitation for filing an application for setting aside those sales and that the first part refers to sales held on or after 1st March, 1972 which have not been confirmed before the commencement of the Amending Act of 1948 or ninety days have not elapsed from the confirmation of the sale at such commencement. On the wording of the section it can be applied to sales which have not been confirmed before the commencement of the amending Act or ninety days have not elapsed at the commencement. Though a sale held after the Act will also satisfy the requirements set out in the section, as in respect of such a sale there is no question of confirmation before the Act, to give such an unrestricted meaning to the words used in section 23-A would be to attribute to the Legislature a wholly whimsical and wayward intention as pointed by Viswanatha Sastri, J. Though section 23-C if literally construed, is wide enough to include sales that had taken place after the Act, as there are no words limiting the scope of the section, we think that having regard to the object with which the section was introduced its operation should be restricted to sales held before the Act. We are of the view that though the section is not happly worded, the intention appears to be clear. The reference to sales not confirmed at the commencement of the Act or ninety days have not elapsed at such commencement in the section is a clear indication that the section is inapplicable to sales held after the Act. If the section is intended to have a wider

1. (1941) 2 M.L.J. 309 : 54 L.W. 228.
2. (1957) 1 An.W.R. 142 : (1957) An.L.T. 26.

operation so as to apply to sales held after the Act, then reference to the factum of confirmation is quite unnecessary and it would have been sufficient to say that all sales after 1st March, 1972 can be set aside at the instance of the judgment-debtor.

15. Section 23-C also uses the same language as section 23-A and, on the wording of the section, it is applicable to sales not confirmed before the publication of the Act or ninety days have not elapsed from the confirmation at such commencement. It is true, if the Legislature can think of setting aside sales held before the commencement of the Act it can also provide for setting aside the sales held after the commencement of the Act, if the sales have been taken place without reference to the benefit which the judgment-debtor has got under the provisions of the Act. The question is whether the Legislature intended to do so. If such was the intention, the words "sale" has not been confirmed before the publication of the said Act in the Tamil Nadu Government Gazette or ninety days have not elapsed from the confirmation of the sale or from the foreclosure would be purposeless. In construing the scope of the first part of section 23-C it is not possible to bring in aid the latter part dealing with limitation as has been done in some cases. The latter part cannot enlarge the scope of the first part.

16. As already stated the main intention behind sections 23, 23-A, 23-B and 23-C is to give an opportunity to the agriculturist-debtor to have his debts scaled down. This object is achieved in cases where the sale is held after the Act by the debtor raising his plea that he is entitled to the benefit of the principal Act as amended from time to time, even before the sale takes place. In such cases there is no necessity for the agriculturists to wait till the sale takes place and then apply for setting aside the same, as they have an opportunity to have the debt scaled down even before the sale. It is only in respect of sales held before the coming into force of the Act which had been confirmed or await confirmation, an opportunity has to be given to the agriculturist to have his decree debt scaled down and to have the sale set aside if the sale has taken place for recovery of any amount in excess of the debt as scaled down. This is the reasoning adopted by the division Bench in *Seshayya* v. *Venkataramayya*[1], while interpreting section 23 and by Viswanatha Sastri, J. in *Ramakottayya* v. *T. Nagi Reddi*[2], while interpreting section 23-A. In interpreting a statutory provision, the intention of the Legislature has necessarily to be kept in mind. Is it possible to attribute an intention to the Legislature in this case to give a further opportunity to an agriculturist to have the sale held after the Act set aside on the ground that he is entitled to the benefits of that Act, even though he had an earlier opportunity to prevent the sale and to have his debt scaled down under the same statute even before the sale takes place ? In respect of sales held after the Act proceedings in execution should have been pending at its commencement or initiated later. In respect of such proceedings the Act gives a sufficient remedy by way of sections 19 and 20 to see that the sale does not take place before the debt is scaled down. After giving such an opportunity to see that execution sale is not held without scaling down the debt, it appears to be quite unnecessary and meaningless to give another or further opportunity to the judgment-debtor to have the sale set aside on the ground that the decree debt has not been scaled down under section 19. Such an opportunity is necessary only in cases where the benefits of the Act could not be claimed and the decree debt scaled down before the sale is held. If such were the intention of the Legislature, then it is unnecessary for the Legislature to provide a restriction with reference to the date of commencement of the Act or the date of confirmation of sale. If the sales after the Act are also intended to be set aside the Legislature would not have fixed a time limit for application with reference to the date of commencement of the Act or of the confirmation.

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1. (1941) 2 M.L.J. 309: 54 L.W. 228: A.I.R. 1942 Mad. 278.
2. (1957) 1 An.W.R. 142 : (1957) An.L.T. 26.

17. In this context the legislative history has also to be taken note of. While interpreting section 23 a Bench of this Court held in *Seshayya* v. *Venkataramayya*[1], that it will apply only to sales held before the commencement of the Act. The Legislature appears to have accepted the decision as a correct interpretation of that provision and brought in section 23-A by Madras Act XXIII of 1948; section 23-B by Madras Act XXIV of 1950 and section 23-C by Madras Act VIII of 1973, for setting aside the sales that had taken place after 30th September, 1947, 25th April, 1950 and 24th January, 1973 respectively with a view to enable the agriculturist-debtors to have the benefit of the corresponding amending Acts. The introduction of sections 23-A, 23-B and 23-C by the various amending Acts would be quite unnecessary if section 23 can be made applicable to all sales after the commencement of the principal Act. The fact that on each occasions when a benefit is conferred on an agriculturist under a statute a new provision for setting aside a sale is made shows that earlier provisions for setting aside sales are intended to have a limited application. The intention of the Legislature in enacting sections 23-A, 23-B and 23-C appears to be to enable the judgment-debtors to set aside sales held hurriedly-just before the introduction of each of the amending Acts conferring certain benefits on the agriculturist-debtors. If the provisions in sections 23, 23-A and 23-B are construed as applicable to all sales held after the commencement of the relevant Acts, then there is no necessity for a separate provision like section 23-C. Having regard to all these circumstances, we hold that section 23-C cannot be invoked in respect of sales that had taken place after the publication of Act VIII of 1973.

18. However, the learned counsel for the appellant points out that though the sale in this case has been held after the Act came into force the confirmation has not yet taken place and therefore, the appellant can seek to set aside the sale on the ground that the decree debt has been scaled down and therefore, the sale should not be confirmed. As the sale has not been confirmed and possession of the property sold has not been delivered to the auction-purchaser, execution proceedings should be taken to be pending and now that the appellant has succeeded in getting the decree scaled down, he is entitled to ask the executing Court to give effect to the order passed under section 19 scaling ing down the debt. Even if section 23-C has no application to sales held after the Act, it does not mean the sale can be confirmed regardless of the effect of scaling-down application. Even then the appellant cannot seek relief under section 23-C but the relief of setting aside the sale can be claimed in proceedings under the Code of Civil Procedure.

19. At this stage, we have to consider the contention raised by the learned counsel for the respondents that as the appellant had not filed an application under section 19 within 60 days from the date of the order under section 20 his right to apply under section 19 is lost. In this case the appellant had filed an application and got an order under section 20 on 28th April, 1973 staying the execution sale. He in fact filed an application under section 19 in I.A. No. 2437 of 1973 on 28th June, 1973. According to the appellant the application under section 19 was filed on the 60th day and therefore it is in time. The respondents on the other hand contend that the application under section 19 has been filed after a delay of two days, and therefore it should not have been entertained. The Court which passed the decree however entertained the application under section 19 as being in time and as also disposed of the same on 15th October, 1973 scaling down the decree debt to Rs. 399-65 after giving credit to the amounts paid earlier. Thus the appellant has succeeded in having the decree debt scaled down under section 19. Therefore so long as the execution sale has not been confirmed, the executing Court has to give effect to the order passed under section 19. The learned counsel for the respondents would contend that the order dated 15th October, 1973 in I.A. No. 2437 of

1. (1941) 2 M.L.J. 309: 54 L.W. 228: A.I.R. 1942 Mad. 278.

1973 cannot be taken to be valid as the appellant has lost his right to file an application under section 19 as he has not filed an application within 60 days. Apart from the fact that the lower Court has entertained the application under section 19 and granted relief to the appellant, even assuming that the application under section 19 was filed after 60 days, it cannot be said that the appellant has lost his right to file an application under section 19. It is true the decisions referred to by the learned counsel for the appellant in *Kumaraswami Pillai* v. *Thiruvengadatha Aiyangar*[1], and *Sethurayar* v. *Karuppayammal*[2], seem to support the respondent's stand. However we are not inclined to agree with the view expressed in these cases that the proviso to section 20 should be construed as providing a period of limitation for filing an application under section 19.

The proviso to section 20 is as follows:—

> "Provided that where within 60 days after the application for stay has been granted the judgment-debtor does not apply to the Court which passed the decree for relief under section 19 or where an application has been so made and is rejected, the decree shall be executed as it stands, notwithstanding anything contained in this Act to the contrary."

Construing the proviso a Division Bench of this Court in *Kumaraswami Pillai* v. *Thiruvengadatha Aiyangar*[1], took the view that the proviso fixes a period of limitation for an application under section 19 and within 60 days contemplated by section 20, and that if steps are not taken under section 19 he cannot thereafter file an application under that section. In *Sethurayar* v. *Karuppayammal*[2], another division Bench had held that if a stay has been ordered under section 20, then the proviso to that section is attracted so as to make it incumbent on the judgment-debtor to file an application for relief under section 19 within sixty days of the stay order. N. S. Ramaswami, J., in a recent decision in C. M. A. No. 396 of 1975 has also followed the earlier decision in *Kumaraswami Pillai* v. *Thiruvengadatha Aiyangar*[1], and held that once the judgment-debtor invokes the jurisdiction of the Court under section 20 and obtains stay of execution then undoubtedly a period of limitation is prescribed by the proviso which specifically says that unless an application under section 19 is filed within 60 days of the order of stay the decree shall be executed as it stands. If the above decisions merely laid down that the decree as it stands can be executed if the judgment-debtor does not file an application within 60 days from the date of the order of stay under section 20, no exception can be taken as that position is clear from the terms of the proviso itself. However, if those decisions are taken as laying down that the judgment-debtor has no right to file an application under section 19 after the period of 60 days, we are of the view that it is not the correct legal position. The proviso merely says that if the judgment-debtor does not apply to the Court which passed the decree under section 20 for relief under section 19 or where the application has been so made and rejected, the decree can be executed as it stands notwithstanding anything contained in the Act to the contrary. The proviso enables the executing Court to proceed with the execution of the decree as it stands if the judgment-debtor does not file an application under section 19 within 60 days from the date he obtains an order under section 20. The proviso does not say that the right of the judgment-debtor to file an application for relief under section 19 is taken away or comes to an end. The proviso which deals with the powers of the executing Court to execute the decree as it stands cannot be construed as curtailing the power of the Court which passed the decree to entertain and deal with an application under section 19 by the judgment-debtor. The words "notwithstanding anything contained in this Act to the contrary" refer only to the restrictions imposed by the Act on the executing Court, particularly by section 7 which prohibits execution of a decree against an agriculturist in so far as a

1. (1939) 2 M.L.J. 308 : 49 L.W. 762 : I.L.R (1939) Mad. 886: A.I.R. 1939 Mad. 613.
2. (1945) 2 M.L.J. 535 : 58 L.W. 632 : A.I.R. 1946 Mad. 158.

1. (1939) 2 M.L.J. 308 : 49 L.W. 762: I.L.R. (1939) Mad. 886: A.I.R. 1939 Mad. 613.

decree is for an amount in excess of the sum as scaled down under Chapter II of the Act. The execution of the decree as it is by that Court cannot be taken as putting an end to the benefits granted to the judgment-debtor by the provisions of the Act particularly by section 19. Even if the sale has taken place in execution of the decree as it stands, still the judgment-debtor can file an application under section 19 and have the decree scaled down and claim the benefit of scaling down at the stage of the application of the sale proceeds. Where an application is made by the judgment-debtor for scaling down after the lapse of 60 days from the grant of stay under section 20 and the decree debt has been scaled down, it is not possible for the sale even if it had taken place as per the proviso, to be confirmed in the face of the order scaling down the debt. It has been held by Horwill, J., in *Lakshminarasimha Rao* v. *Garapati Muneyya*[1] that merely because full satisfaction of the decree has been entered up as a result of the sale and the confirmation thereof, it does not mean that execution is at an end, and section 20 can, therefore, be invoked to stay the delivery of the property to the auction-purchaser pending the application for scaling down the decree debt. We are not 'therefore' inclined to construe the *non obstante* clause occurring in the proviso as excluding the application of the Act to the judgment-debtor after the 60 days referred to therein. After the scaling down of the debt the further execution proceedings after the sale can proceed only on the basis of the decree as scaled down. The execution of a decree cannot be said to be complete unless the properties are actually delivered to the auction-purchaser. We cannot therefore agree with the learned counsel for the respondents that the appellant's application for relief under section 19 cannot be sustained after the period of 60 days.

20. We, therefore, dismiss the appeal holding that section 23-C cannot be invoked to set aside the sale held in this case, though it is open to the judgment-debtor to raise the plea that the decree debt had been scaled down under section 19 of the Act at the stage of confirmation of sale. There will be no order as to costs.

R.S. *Appeal dismissed.*

1. (1940) 2 M.L.J. 234 : 52 L.W. 244 : A.I.R. 1940 Mad. 825.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*S. Mohan, J.*

K. V. Kandasamy Gounder, President Negamam Town Panchayat, Pollachi Taluk, Coimbatore District .. *Petitioner**

v.

The Collector and Inspector of Panchayats, Coimbatore District, Coimbatore and another .. *Respondents.*

Tamil Nadu Panchayats Act (XXXV of 1958), *sections* 149-A (11), 56—*President of Panchayat—Removal of—Meeting called by respondent—Resolution passed by majority of members for removal—Removal of President with retrospective effect from the date of resolution—Validity.*

In the light of section 56 of the Tamil Nadu Act XXXV of 1958, the only conclusion that is possible is that only a prospective date is contemplated under sub-section (11) of section 149-A of the Act regarding the removal of the President of the Panchayat from office. [*Para.* 4.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the respondent in his proceedings R.C. No. 159101/75/T.8, dated 21st March, 1976 and quash the same.

P. Chidambaram for *M.N. Krishnamani*, for Petitioner.

* W.P. No. 1335 of 1976. 28*th April,* 1976

S. Ramalingam, Assistant Government Pleader, for First Respondent.

K. V. Sankaran for *R. Nadanasabapathy*, for Second Respondent.

The Court made the following

ORDER.—The short facts leading to this Writ Petition in which the petitioner prays for *certiorari* to quash the proceedings of the Collector (Inspector of Panchayats, Coimbatore District, Coimbatore), dated 21st March, 1976 are as follows: In 1970, the petitioner was elected as the President of Negamam Town Panchayat. The electorate consists of voters on the electoral roll of the Town Panchayat. The sanctioned strength of the Panchayat is fifteen. On 22nd October, 1975, the respondent communicated to the petitioner certain charges and called upon him to show cause as to why action should not be taken under section 149-A (1) of the Tamil Nadu Panchayats Act (XXXV of 1958). The petitioner submitted his explanation. A meeting took place on 13th February, 1976 to ascertain the views of the members of the Panchayat about the removal of the petitioner from the Office of President. At that time, the petitioner protested against the convening of the meeting. This meeting was attended by 13 members. Seven voted for removal while six were against. After ascertaining the views of the members, the Tahsildar sent a report to the first respondent who passed the impugned order on 21st March, 1976 directing the removal of the writ-petitioner from the Office of President with effect from the date of resolution of the Panchayat, namely, 13th February, 1976.

2. Mr. P. Chidambaram, learned counsel for the petitioner though wanted to attack the impugned order on several grounds, in the first instance, he confined his argument only to this narrow ground that having regard to the language of section 149-A, sub-sections (11) and (12) of the Act, the fixing of the date by the Collector as 13th February, 1976 in the impugned order is bad since sub-section (11) of section 149-A of the Act contemplates only a prospective date. He bases his submission by drawing my attention to section 56 of the Act and contends that if any other date is fixed, all the acts which were done would be rendered invalid and that there is no section which would cure that invalidity. At the time when he exercises the function as a President, certainly he had every legal competency. The fixing of the retrospective date would render all the acts which were done by the petitioner invalid. It would certainly not have been the intention of the Legislature.

3. It is further argued by the learned counsel for the writ petitioner that sub-section (12) of section 149-A of the Act gives an indirect clue that it should only be a prospective date. The learned Government Pleader in meeting these submissions, argues that all that is mentioned under sub-section (11) is a date to be specified and that that date may be either prospective or retrospective. So long as it is a specified date, there is a proper compliance of sub-section (11) of section 149-A of the Act. Mr. K. V. Sankaran, learned counsel for the 2nd respondent who has been impleded by an order, dated 9th April, 1976, submits that the removal could be only by sub-section (12) of section 149-A of the Act since the notification under sub-section (11) comes into effect only on publication. Therefore, there would be time enough for the person affected by the order of the Inspector to move the Government and seek a postponement of the date specified in the notification.

4. I may, at the outset, say that both the sub-sections (11) and (12) of section 149-A are not happily worded and it is this unhappy wording that has given rise to these arguments. Secondly, if it was the intention of the Legislature that a retrospective date also is contemplated within sub-section (11) of section 149-A, it should have been specifically stated. But the language used is—"remove the President from office by notification with effect from a date to be specified therein." It is possible to argue, as it is being done, by the respondents, that this takes in even a retrospective specification of the date. But the argument of the respondent ignores the important fact that till the Collector decides to remove after considering the views of the Panchayats, every act of the President would be valid in law. If a retrospective date is con-

templated under sub-section (11) what is to happen to various contracts or any other similar action entered into or taken by the President? They would all be rendered invalid. Section 56 of the Act cannot also cure that invalidity since that section contemplates the invalidity arising out of a defect in the establishment or on the ground of the petitioner not being entitled to hold or continue in such office by reason of any disqualification or by reason of any irregularity or illegality in his election or again by reason of the act having been done during the period of any vacancy. If read in the light of that section, the only conclusion that is possible is a prospective date. However, sub-section (12) does not throw any light with regard to the interpretation of sub-section (11) since sub-section contemplates removal only by notification which notification would come into effect on publication. Therefore between the date of the order and the publication the affected President would have time enough to move the Government and seek the postponement of the date specified for removal. This apart, the order of the Collector does not give as to what exactly is the reason that prompted him to fix the date as 13th February, 1976. Perhaps he thought that from the date of the passing of the resolution, inasmuch as the Panchayat had expressed in unequivocal terms in favour of removal of the writ petitioner, it should take effect. It may even be possible to argue under these circumstances that the Inspector did not exercise his statutory function while considering the views of the panchayat since the relates the removal to the date of the resolution. But I am not going into that question. On the short ground that only a prospective date is contemplated under sub-section (11) of section 149-A of the Act, this writ petition is allowed and the matter is remitted to the Collector for fresh consideration in the light of the observations made above. However, there will be no order as to costs.

R.S. — *Case remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

Mohamed Ghouse .. *Appellant**

v.

Mohamed Yusuf and another .. *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 92, *Wakf Act* (*XXIX of* 1954), *section* 55—*Suit for declaration—Wakf—Trustee alleged to be not a fit person—Whether can be removed from trusteeship—Suit under section* 55 (2) *of Wakf Act to be for vindication of public right—Mis-management no ground for modifying scheme—No mis-management proved either—Suit dismissed on appeal.*

A suit was filed by some beneficiaries under a wakf deed for removal of the trustee and for framing a scheme. The suit was decreed as prayed for. The plaintiffs had alleged mis-management of the trust funds, since they had not received anything from the trust. Though the defendant produced the account books, there were not examined by the plaintiffs and no fault had been made out. The defendant preferred an appeal.

Held : From an overall appreciation of a given situation, it should be made clear that if a suit under section 55 (2) of the Wakf Act had been filed, then it should be for the vindication of a public right. [*Para.* 6.]

The mere fact that some mis-management had resulted through the misconduct of the trustees was not a ground to modify a scheme which contained provisions, which, if properly worked out, were sufficient to protect the interest of the trust. The plaintiffs' counsel harped upon the mis-management of the defendant in the light of the non-distribution of the share of the net income tothe dependants of the donor. Apart from the fact that such an assertion was indicative of the private interests of the plaintiffs for which purpose no suit either under section 92 of the Civil Procedure

*App. No. 116 of 1971. 21*st November,* 1975.

Code or under section 55 of the Wakf Act was maintainable, the plaintiffs had not even established reasonably that their apprehension about the accounts was justified. [*Paras.* 6 *and*. 9.]

In the absence of objective evidence about malversation or misfeasance on the part of the trustee, the subjective satisfaction of the Court without even a full probe into the evidence on the conduct of the trustee could not go a long way to prompt the Court to remove him, as the primordial consideration in such circumstances was the interests of the institution. In this case, no case had been made out by the plaintiffs for the removal of the defendant on the ground that the interests of the trust and its administration so required. [*Para.* 10.]

Cases referred to:—

Parmatmanand Saraswati v. *Ramji Tripathi*, (1974) 2 S.C.C. 695 : (1975) 1 S.C.R. 790: A.I.R. 1974 S.C. 2141 ; *Venkatarama Chetty* v. *Thiruvengadathan Chetty*, (1915) 28 I.C. 479 : A.I.R. 1916 Mad. 530 ; *Zamindar of Kalahasti* v. *Ganapathi Iyer*, (1918) M.W.N. 555: 48 I.C. 897 : A.I.R. 1918 Mad. 56 (2); *S. Veeraraghava* v. *V. Parthasarathy*, (1925) M.W.N. 505 : A.I.R. 1925 Mad. 1070.

Appeal against the decree of the Court of the Subordinate Judge of Nagapattinam, dated 2nd December, 1970 and passed in O.S. No. 36 of 1968.

G. Ramaswami and *V. Sridevan*, for Appellant.

S. K. Ahmed Meeran, M. I. Meera Sahib, Abdul Hadi and *M. A. Sathar Sayeed*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The defendant in O.S. No. 36 of 1968 on the file of the Court of the Subordinate Judge of Nagapattinam is the appellant. Under Exhibit A-1, dated 16th December, 1904, Sikkandar Rowther, the common ancestor of the parties before us, executed a deed of Wakf endowing considerable agricultural properties, both Nanja and Punja of an extent of about 179.17 acres for the purpose of performance of certain charities and incidentally directing the muthavalis functioning under the Wakf deed to divide 6/16 of the net income after expending for the charities amongst his own descendants. The balance of 10/16th share of the net income was to be spent towards the performance of *moulooth* on a prescribed date at a prescribed place at which the prescribed quantity of rice pulav should be cooked for distribution among the poor, the relatives and the friends. Similarly, a *moulooth* for the distribution of food to all Muslims and miskins present at the Nagore Andavar Vasal should be prepared and so distributed. Besides the agricultural properties, premises No. 35, Therupalli Street, including certain moveables were endowed for the purpose of performance of the obligations under the trust. Under Exhibit A-2, a friend of Sikkandar Rowther, by name Vanjoor, Madar Sahib, executed another Wakf deed on 27th June, 1914, thus creating an accretion to the original Wakf. The purposes, however, are to a similar effect excepting for the fact that briyani rice of a particular quantity should be cooked and distributed to the poor and the relatives of Sikkandar Rowther on every anniversary of his. Under Exhibit A-1 Sikkandar Rowther appointed himself as the first trustee and gave directions as to the succession of trustees. He left behind him three sons, two daughters and provided for the trusteeship devolving on one of his male descendants, who is capable of properly managing the endowment. There is a provision for removal of an incapable trustee or a trustee, who has become unfit to hold the office. One Bava Mohideen assumed such management of trusteeship in or about 1915, According to the plaintiffs in the action. who claimed to be interested in the trust as descendants of Sikkandar Rowther, Bava Mohideen was not managing the affairs of the trust properly. A suit O.S. No. 188 of 1934 was filed in the Court of the District Munsif, Nagapattinam, against the said Bava Mohideen complaining about such mismanagement. But the contesting and the interested parties settled their differences and under an agreement, dated 26th March, 1934 it was agreed that Bava Mohideen, Haleeth Rowther, one other son of Sikkandar Rowther and Mohammad Ghouse, the

daughter's son of Sikkandar Rowther, should look after the Wakf by turns. Soon after Haleeth Rowther died. Again troubles arose. The difference had to be referred to the arbitration of the village headman, one Mohammad Kasim, who gave an award on 2nd February, 1941. In connection with the award, there were two litigations, one was filed by Mohammad Ghouse, the daughter's son of Sikkandar Rowther for passing a decree in terms of the award. One Maimoon Sharifa Beevi, daughter of Haleeth Rowther, who is the second respondent herein, was also a party in that suit. It is unnecessary to refer to the other parties in that action and the other connected litigations. The second litigation objecting to the award passed by Mohammad Kasim was filed by Bava Mohideen himself under O.P. No. 72 of 1943. The suit filed by Mohammad Ghouse (O.S. No. 18 of 1941) was decreed and Bava Mohideen's petition to set aside the award was dismissed. The Wakf apparently was satisfactorily functioning under the terms of the award and in relation to the management of its properties till Bava Mohideen died on 30th March, 1953. We may state that between 1943 and 1953 Bava Mohideen, one of the sons of Sikkandar Rowther, was in joint management along with Mohammed Ghouse, the appellant herein during that period. After the death of Bava Mohideen, Mohammad Ghouse became the sole trustee. Thereafter disputes arose between the descendants of Sikkandar Rowther and a spate of litigation started.

2. Jamila Ammal, one of the descendants of Bava Mohideen, filed a suit against Mohammad Ghouse for rendition of accounts and for payment of her share in the net income of the properties as per the deed of trust. This suit had a chequered career and it is still pending in the Subordinate Court. Mohammad Ghouse, the appellant, in turn filed a suit against some of the descendants of the common ancestor for recovery of possession of the trust properties in their possession. This is reported to have been decreed in 1975. Thereafter, two suits were filed by respondents 1 and 2 against the appellant for an account of the trust monies and for other reliefs. They are O.S. No. 66 of 1965 and O.S. No. 5 of 1969. It is reported, however, that both have been dismissed for default. The present suit by respondents 1 and 2, who are the daughter's daughter's son and the son's daughter of late Sikkandar Rowther, is a suit for declaration that Mohammad Ghouse, the appellant herein, who is also a daughter's son of the ancestor, is not a fit and proper person to be a trustee of the Wakf properties and for removing him from trusteeship from the Sikkandar Rowther Wakf and for framing a scheme for the proper management of the same.

3. The defendant raised various contentions. He would say that the trust created by Sikkandar Rowther, is different from the trust created by Vanjoor Madar Sahib and a common suit in relation to both would amount to misjoinder of causes of action. After referring to the litigations summarised by us, the defendant would say that in the course of his administration, he had been obstructed in various ways, by the plaintiffs and other descendants of Sikkandar Rowther. He complains of malversation of trust funds by the plaintiffs and would add that he had been performing the obligations under the trust as prescribed in the Wakf deed and explains the reason as to why he could not pay the beneficiaries under the trust as directed. Since the trust properties were affected by adverse seasonal conditions and, particularly, during the cyclone in 1952, he had to advance large sums of money for the preservation of the trust properties and would claim that as on date of the suit, large sums are yet to be recouped by him from the trust and it was in those circumstances, payment to the beneficiaries were not feasible. He would also take up the legal contention that the main issue in the case revolves upon the non-distribution of the net income to the beneficiaries and that by itself would not be a ground for filing the present suit either under section 92 of the Civil Procedure Code, or under the provisions of the Wakf Act. He claims that the real income got from the lands has been shown from time to time in the return sent to the Wakf Board and they are all reflected in his regularly kept accounts. The suit is neither *bona fide* nor filed in the interests of the trust and the relief for removal of the appellant as Muthavalli

is a misconceived remedy, which is asked for by the plaintiffs-respondents. On the above pleadings, the following issues were framed for trial :

1. Is the suit bad for want of consent of the Advocate-General under section 92 of Civil Procedure Code ?

2. Is the suit bad for misjoinder of causes of action for the reasons stated in paragraph 9 of the written statement ?

3. Is the suit unsustainable for the reasons stated in paragraphs 4 and 5 of the written statement ?

4. Is the Judgment in O.S. No. 18 of 1941 of this Court and the appeal therefrom binding on the plaintiffs ?

5. Has the defendant failed to perform the charities prescribed under the Trust deed properly or at all and is he liable to be removed for that reason from trusteeship ?

6. Is the defendant guilty of mismanagement, malversation of trust funds or other misconduct as alleged in the plaint and is he liable to be removed from trusteeship for that reason ?

7. Is the framing of a scheme necessary for any of the reasons set out in the plaint?

8. Have the plaintiffs no interest in the Trust created by Vanjoor Madar Sahib and are they not entitled to file the suit in respect thereof ?

9. Has the suit not been instituted in the interest of the Trust and is it unsustainable for that reason ?

10. Is the consent of the Wakf Board not valid ?

11. To what relief, if any, are the plaintiffs entitled ?

Additional Issues framed on 25th September, 1970.

1. Is a single suit brought for framing of a scheme for the two wakfs contained in the two deeds of 16th December, 1904 and 27th June, 1914 maintainable ?

2. Is the suit under section 92, Civil Procedure Code sustainable with reference to the 6/16th share of the income distributable among the beneficiaries ?

3. Whether the suit is barred by time ?

4. Though many of the above issues have been framed, the primary question which arises for consideration in this case, is, whether the plaintiffs have come to Court as disinterested persons or persons championing their own cause as the ultimate beneficiaries, who are benefited in the distribution of 6/16th share of the net income from the Wakf amongst the descendants of Sikkandar Rowther. Secondly, the question is whether the defendant's conduct and his course of administration is such as to show that he had made himself unfit to be a trustee, and he ought to be removed from the trusteeship of the Wakf. Thirdly, whether an occasion has been made out for the framing of a scheme, as it is alleged that the Wakf has been improperly managed.

5. The defendant in his written statement has brought out that it is the private interest of the beneficiaries as a whole and the plaintiffs in particular, which have prompted them to come to Court for his removal. It is not in dispute that the manner in which the net income has to be distributed amongst the descendants is still the subject-matter of adjudication in Courts of law and that it is impossible for any trustee, under the present circumstances, to take upon himself the responsibility of any such distribution pending such final adjudication. The appellant would put to the forefront that it is the present dissatisfaction which is lurking in the minds of the beneficiaries that is responsible for the present suit. He complains that one of the plaintiffs is occupying one of the trust properties and they are obstructing him in the matter of the normal performance of the moulooth at the scheduled place. The defendant has also taken steps for evicting the plaintiffs from the Wakf properties and in conclusion would say that the suit is not at all *bona fide* and has not been filed in the interests of the trust at all and that it is only due to malice and ill-will against the defendant that the present action has been initiated.

6. Though the consent of the Wakf Board has been obtained under section 55 (2) of the Wakf Act, yet the principle running in the vein of this process contemplated in suits filed under section 92

Civil Procedure Code, and under section 55 of the Wakf Act of 1954 govern the present situation. From an overall appreciation of a given situation, it should be made clear that if a suit under section 55 (2) of the Wakf Act has been filed, then it should be for the vindication of a public right. Even then, the action should not be camouflaged with such a request or relief. It must be a genuine desire on the part of the litigant to expose public rights. It is in this view that the Supreme Court said in *Parmatmanand Saraswati* v. *Ramji Tripathi*[1], that it is not every suit claiming the reliefs specified in the section that can be brought under the section but only the suits which, besides claiming any of the reliefs, are brought by individuals as representatives of the public for vindication of public rights and in deciding whether a suit falls within section 92, the Court must go beyond the reliefs and have regard to the capacity in which the plaintiffs are suing and to the purpose for which the suit was brought. Further, in cases like this, it is very necessary to substantiate fully the allegations as to the breach of trust or compel the Court reasonably to give a direction to the trustees in management to properly administer the trust. If either or both of the above requirements are not fully made out, then the very basis of the suit under section 55 of the Wakf Act or under section 92 of the Civil Procedure Code, would fail. The Supreme Court made it clear in the very same decision as above that even if all other ingredients of a suit under section 92, Civil Procedure Code, are made out, if it should be brought out that the plaintiffs are not suing to vindicate the right of the public, but are seeking for a declaration of their individual or personal rights or the individual or personal rights of any other person or persons in whom they are interested in such circumstances, the suit would be outside the scope of section 92, Civil Procedure Code. Yet again the law is clear that the mere fact that some mismanagement has resulted through the misconduct of the trustees is not a ground to modify a scheme which contains provisions, which if properly worked out are sufficient to protect the interest of the trust, (vide *Venkatarama Chetty* v. *Thiruvengadathan Chetty*[1]. Even on the third point posed by us for consideration the plaintiffs have to establish the necessity for re-framing a scheme but cannot rest content by alleging that the trust has been mismanaged. It is in the background of the above well laid principles, we should consider next as to what are the grounds on which a trustee of a public trust could be removed. We could do no better than to quote from Mulla on the Principles of Mohamedan Law (Sixteenth Edition at page 215). The learned author says :

> "A mutawalli may be removed by the Court on proof of misfeasance or breach of trust, or if it is found that he is otherwise unfit to hold the office, though the founder may have expressly directed that he should not be removed in any case."

What exactly has been urged by the plaintiffs in the instant case is that no proper accounts have been maintained, that the moulooth has not been performed properly, that the distribution of the net income to the descendants has not been properly made and that a reserve has not been maintained as directed in the trust. In so far as the above grounds of attack are concerned, the lower Court found that the moulooth was performed properly and the non-distribution of the net income to the descendants could not be made, since the High Court is in seisin of the matter and while the proceedings are thus pending the plaintiffs cannot ask for a parallel relief in the present suit and the defendant cannot be charged for non-payment of their share of the income and that cannot form a ground for removing him from trusteeship.

7. The only other surviving grounds of attack are whether the accusation of the alleged improper maintenance of accounts is true and whether the defendant as trustee failed in his obligation in not keeping a reserve amount, for the purpose of ultimate distribution of the net income to the sharers as directed. The plaintiffs' case is that for a considerable length of time, the beneficiaries

1. (1974) 2 S.C.C. 695: (1975) 1 S.C.R. 790: A.I.R. 1974 S.C. 2141.

1. (1915) 28 I.C. 479: A.I.R. 1916 Mad. 530

had not been paid, and that he had been consistently appropriating a major part of the income towards the moneys advanced by him, for the preservation and upkeep of the trust. This, according to the plaintiffs, is an act, which savours of mismanagement and has to be taken into consideration by the Court to find out whether he should be removed from trusteeship.

8. At this stage, it would be necessary to scrutinise the evidence let in this case and find out whether there has been a malversation of trust funds or other such allied misconduct on the part of the trustees. The defendant has produced his accounts as also the various documents such as lease-deeds executed by him to show what probably would be the income from the trust. Exhibits B-8 to B-51 are the ledgers and the day-books from 1948 to 1970. They were before the Court. The allegation of the plaintiffs, which gained favour with the trial Court that there was sufficient and surplus income is based upon no evidence at all. The extent of the land dedicated in the wakf is about 155.13 acres of Nanja and 29.13 acres of Punja. There are also about three shops and two buildings and a garden which are annexed to the Wakf. A single crop was raised on an extent of about 155 acres and a double crop on an extent of 25 acres. This is seen from Exhibits A-9 to A-14 ,which are adangal extracts for faslis 1375 and 1376. Curiously enough the learned Judge surmised that the rental income would be on the average at 5 Kalams per Ma and that the total yield would be at least 2500 Kalams. The learned Judge rightly scrutinised the ledger Exhibit B-23 and he makes no comment on the income from the lands as entered therein. But from a reasoning, which as we characterised, is not based upon any acceptable evidence, he would assess the income and take the recitals as to the expenses in the ledgers and arrive at the conclusion, that there should be a saving of at least Rs. 7,000 to Rs. 8,000. He would not, as already stated, reject the accounts. No Commissioner was appointed to go into the accounts and report as to whether they were regularly and properly maintained. According to the books of account, the defendant claims that the income was not sufficient to meet the expenses and the debts payable by the Wakf. The learned Judge takes up the accounts and hears arguments on them. He notes the criticism made by the plaintiffs on the said accounts. According to the plaintiffs the account books, though old, and regularly written up, are said to be got up one and sedulously written up on. He does not give a definite finding that the entries in the accounts are spurious. As a matter of fact, the lower Court did not advert itself to the accounts, as it ought to have done; but makes certain general observations against the conduct of the defendant. The learned Judge would also admit at one stage, that when the accounts are scrutinised in detail and when the entries are checked itemwar, it would be possible to find out whether the defendant had misappropriated or committed breach of trust. He does not however venture or cause such a checking of the accounts to be made. He would accept the contention that a probe into the accounts is absolutely necessary. He categorically finds even on such cursory examination of the accounts that in the instant case misappropriation has not been actually proved. The Wakf Board does not criticise the accounts or characterise them as having been got up or spurious. The defendant has been consistently pleading that he advanced monies to the trust from time to time and has been preserving the Wakf properties from being damaged by floods etc., and it is due to such adjustment of the debts from and out of the income from the properties, the defendant could not make out a surplus or create a reserve as contemplated in the trust deed. Moreover, he could not make a distribution of such an available surplus even if any, since the manner of distribution is yet to be settled by the Courts of law. The finding of the learned Judge that though the trustee did not pay the beneficiaries he should have set apart and segregated a certain amount for payment to the beneficiaries, is an uncharitable remark, since the case of the defendant that there was no such available surplus for distribution because of the debts of the Wakf and these accounts have not been scru-

tinised and adjudicated upon by the Court below. The account books filed into Court from 1948 to 1970 have not been looked into and examined in a manner known to law. The learned Judge himself admits that the defendant may not be liable for non-payment of the income to the beneficiaries in the present suit as matters stand. In such a nebulous and uncertain state of affairs, the contradictory findings of the Court below that even though misappropriation has not been proved, there are circumstances which throw suspicion on the conduct of the defendant and the accounts maintained by him appears to be unjustified and is not based on acceptable evidence. This is not a case in which the Court categorically finds that the defendant was encumbering the trust properties by systematically incurring expenses beyond the limits of its income. There is no express finding either that the continuance of the defendant as trustee would endanger the interest of the institution. As was pointed out by our Court in *Zamindar of Kalahasti* v. *Ganapathi Iyer*[1]:

> "It is not however every mistake or neglect of duty or inaccuracy of conduct that will induce a Court to remove a trustee. The acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties of the office or a want of reasonable fidelity."

In the absence of such continuous, dishonest, designed and motivated activities of a trustee, which would impair the corpus of the trust, and shake its foundation, it would be difficult for this Court and particularly, due to the wavering findings of the Court below, to agree with it that the plaintiffs have made out a case for removal of the trustee.

9. It is in the light of such evidence let in this case that we should now take up the contention of Mr. Ahmed Meeran, who harped upon the alleged mismanagement of the defendant in the light of the non-distribution of the 6/16th part of the net income to the descendants of the donor. Though the account books are in Court, the plaintiffs did not request for a scrutiny of those accounts; but they did not go anywhere near it for the purpose of a probe to find that a case of misappropriation or malversation has been made out. Arguments are built on bare suspicion and not on established facts. A person can only produce the accounts maintained by him and if the opponent wants to surcharge the other on such accounts, he should make out a case by a deep study and a scrutiny of such accounts, but should not rest content by criticising them without even looking into them. Mr. Meeran repeats the argument urged by the plaintiffs in the lower Court and would say that the plaintiffs did make out a case for removal of the trustee. His accent was on the non-distribution of the net income to the descendants. Apart from the fact that such an assertion is indicative of the private interest of the plaintiffs for which purpose no suit either under section 92, Civil Procedure Code, or under section 55 of the Wakf Act is maintainable, the plaintiffs have not even established reasonably that their apprehension about the accounts is justified. The role played by the plaintiffs is that they accused the defendant. They do not go into the accounts. They do not prompt the Court to find that the expenses incurred by the trustee are not justified. They also conceded that the manner of distribution of the available surplus if any, is still to be adjudicated upon by this Court. But yet they would seek for a removal of the trustee on vague, uncertain and unproved allegations.

10. Reliance is placed upon a decision in *S. Veeraraghava* v. *V. Parthasarathy*[1]. There, the Full Bench of our Court laid down a salutary principle for removal of trustees and the Bench held thus:

> "Once a person accepts an office of trustee-ship the one governing consideration in his mind, the ruling motive

1. (1918) M.W.N. 555: 48 I.C. 897: A.I.R 1918 Mad. 56 (2).

1. (1925) M.W.N. 505 : A.I.R. 1925 Mad. 1070.

for all actions, the one principle by reference to which all his acts should be determined, is the interest of the institution and that alone. Persons who, though holding a fiduciary position allow their actions to be prompted by any other considerations, motives, principles are as much guilty of breach of trust as persons who may be found actually guilty of misappropriating property belonging to the trust. Even though the evidence in a case against the trustees may not be sufficient to warrant, generally speaking, their removal from office on the ground of misconduct or negligence, still their removal may be ordered if, in the opinion of the Court, such removal is necessary in the interests of the trust to be administered".

It is, therefore, clear that in the absence of objective evidence about malversation or misfeasance on the part of the trustee, the subjective satisfaction of the Court without even a full probe into the evidence on the conduct of the trustee cannot go a long way to prompt the Court to remove him, as the primordial consideration in such circumstances is the interests of the institution. The plaintiffs have miserably failed to let in any evidence touching upon the motive of the defendant in the matter of the administration of the trust property, as he is doing. We have to say that in this case no case has been made out by the plaintiffs for the removal of the defendant on the ground that the interests of the trust and its administration so requires.

11. We have already referred to the conflicting observations made by the court below, which has not definitely stated and found that the defendant's actions as trustee and in relation to the Wakf are such that the Court is reasonably prompted to remove him from the trust. We do not find, in the instant case any proof of such misconduct which throws light upon the misconduct of the trustee in the administration of the trust. We have already referred to the decision in *Venkatarama Chetty* v. *Thiruvengadathan Chetty*[1] and observed that mere mismanagement is not enough to modify a scheme. Further, in the view that we hold that the plaintiffs did not make out a case of mismanagement or misconduct on the part of the defendant, and that no clear and acceptable evidence has been let in to bring out that the interests of the institution require the removal of the defendant, the plaintiffs' case fails in this behalf. As it is not necessary, therefore, to modify the scheme, as the defendant is *prima facie* conducting himself in accordance with the scheme and the wakf deed, we do not feel justified in accepting the alternative prayer of the plaintiffs for the modification of the scheme as well.

12. In the result, the judgment and decree of the trial Court are set aside, the suit is dismissed and the appeal is allowed with costs.

S.J. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

H.M. Kari Gowder .. *Appellant**

v.

S.A.K. Chinnathambi Chettiar and others .. *Respondents.*

(A) *Transfer of Property Act* (*IV of* 1882), *section* 58 (*g*)—*Mortgage by deposit of title deeds—Delivery of documents with intent to create a security essential.*

(B) *Indian Registration Act* (*XVI of* 1908), *section* 17—*Document constituting bargain regarding the security—Registration necessary.*

(C) *Negotiable Instruments Act* (*XXVI of* 1881), *section* 116—*Presumption—Burden of proof.*

Under section 58 (*g*) of the Transfer of Property Act, in certain metropolitan cities like Calcutta, Madras and Bombay and in any other town, which the State Government concerned may, by notification in the official gazette specify a mort-

1. (1915) 28 I.C. 479: A.I.R. 1916 Mad. 530.

*Appeal Nos. 294 and 295 of 1970.

18th September, 1975.

gage by deposit of title deeds known as equitable mortgage can be created. It could be created by the debtor delivering to the creditor or his agent the documents of title to immovable property with intent to create security thereon. The requirements which have to be necessarily complied with are firstly, delivery of title deeds relating to immovable property in one of the specified towns; and secondly, such delivery or deposit must be with intent to create security thereon. These two factors act conjunctively and they cannot be dissociated under any circumstances whatsoever. Under section 58 (*g*) delivery of documents means actual delivery and not constructive delivery or constructive deposit. No doubt, in a case where the creditor is in possession of the title deeds of the debtor it may not be strictly necessary for him to redeliver the same to the creditor under certain circumstances if there is continuity in the transaction or if the parties intended that the original delivery is sufficient to constitute security for the later dealing. It all depends upon the facts of the case.

[*Para.* 14.]

An equitable mortgage or mortgage by deposit of title deeds consists of a transaction and a bargain. If both the transaction and the bargain are telescoped one with the other and they appear to be so integrated, then oral evidence is admissible to prove both. The transaction reveals the borrowing and the bargain depicts that there was a deposit of title deeds within the jurisdiction of a prescribed town with intent to create security. If, however, the bargain is reduced to writing, then the question often arises whether such writing is the sole repository of the evidence of the bargain or if it is merely a memorandum or record of the past or earlier transaction which brings out the intention to the borrower to create an equitable mortgage over immovable properties in connection with which alone the title deeds have been delivered or deposited. As no oral proof of writing is possible and indeed eschewed by the provisions of the Evidence Act, it becomes necessary to understand the true legal effect of the writing in case parties choose to reduce the bargain or their contract to writing. If at the time of borrowing the title deeds are deposited or indeed handed over with no more incidents attached to it, but with intent to create a mortgage thereon, then the presumption arises that the parties intended so and a mortgage has been created in accordance with section 58 (*g*). If the letter or writing between the borrower and the lender on its true understanding and in the light of the surrounding circumstances is evidence of a past transaction, then that instrument or letter or writing does not create a mortgage by itself. What is needed is that the writing on the face of it and on a rational and normal interpretation of it should show that it was under that letter, writing or instrument that the mortgage was created. In other words, the writing should have an operational effect, but should not be purely evidential in scope.

[*Paras.* 17 *and* 18.]

No doubt, special rules of evidence are provided for under the the Negotiable Instruments Act. Section 116 says that until the contrary is proved, *inter alia* the presumption that every negotiable instrument was made or drawn for consideration shall be drawn. But such a presumption may sometimes be displaced by certain acceptable materials placed by the maker of the note under circumstances shifting the burden of proof from the maker to the payee. The presumption that could be raised under section 116 is only a *prima facie* presumption. If the maker of the note satisfies the conscience of the Court that at no time consideration passed under the negotiable instrument and that he executed it under certain circumstances which are not far from truth, then the ordinary presumption that consideration is to be presumed will not arise. As a matter of fact, the maker of the note or the defendant in an action on a promissory note may also rely upon circumstantial evidence and if those circumstances are compelling, the burden would likewise shift again to the payee or the plaintiff to establish the existence of consideration or at least its probability.

[*Para.* 9.]

Cases referred to:—

The Chief Controlling Revenue Authority, Madras v. *M/s. Pioneer Spinners Private Ltd.*, (1968) 1 M.L.J. 96 : I.L.R. (1968) 2 Mad. 284 : 80 L.W. 483 : A.I.R. 1968 Mad. 223; *Prakash Dev* v. *New Bank of India*, A.I.R.

1968 Delhi 244; *United Bank of India* v. *Lekhram S. & Co.*, (1965) 2 S.C.J. 91 : (1965) 2 An.W.R. (S.C.) 5 : (1965) 2 M.L.J. (S.C.) 5 : 1966 S.C.D. 44: A.I.R. 1965 S.C. 1591; *V.G. Rao* v. *Andhra Bank*, 1971 S.C.D. 1097: A.I.R. 1971 S.C. 1613; *Rachpal Mahraj* v. *Bhagwandas Dwarka*, (1950) 2 M.L.J. 350 : 1950 S.C.J. 361 : 1950 S.C.R. 548 : A.I.R. 1950 S.C. 272 ; *Cola Sundarachariar* v. *Narayana Ayyar*, (1931) 60 M.L.J. 506 : L.R. 58 I.A. 68 : I.L.R. 54 Mad. 257 (P.C.) : A.I.R. 1931 P.C. 36 ; *Hari Sankar Paul* v. *Kedar Nath Saha*, (1939) 2 M.L.J. 522 : L.R. 66 I.A. 184 : I.L.R. (1939) 2 Cal. 243 (P.C.) : 50 L.W. 33 : A.I.R. 1939 P.C. 167 ; *Shaw* v. *Foster*, (1872) 5 H.L. 321.

Appeals against the decree of the Court of the Subordinate Judge, Nilgiris at Ootacamund, dated 28th November, 1969 in O.S. No. 152 of 1968 and 222 of 1966 respectively.

V. Sridevan, G. Masilamani and *Balachander*, for Appellant.

T. R. Srinivasan and *K. Ramamoorthy*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The learned Subordinate Judge of Nilgiris at Ootacamund, combined the two original suits, O.S. Nos. 222 of 1966 and 152 of 1968, and rendered a common judgment. It is not seriously disputed that though not expressly but by implication at least the two suits are connected. The parties agreed that the evidence recorded in O.S. No. 222 of 1966 may be taken as evidence in the other suit as well and reference to the parties in this judgment will, therefore, be with reference to O.S. No. 222 of 1966. A.S. No. 295 of 1970 is directed against the judgment and decree of the lower Court in O.S. No. 222 of 1966 and A.S. No. 294 of 1970 is directed against the judgment and decree in O.S. No. 152 of 1968. The defendant in O.S. No. 222 of 1966 and the plaintiff in O.S. No. 152 of 1968 (one H. M. Kari Gowder) is the appellant in both the appeals.

2. We shall now trace the relevant facts independently in each of the suits and whenever necessary the collective facts in both the suits. The 1st plaintiff in O.S. No. 222 of 1966 is a partnership firm and is represented by its managing partner S. A. K. Chinnathambi Chettiar who is also the second plaintiff therein. The defendant is a potato grower and businessman. The plaintiffs are dealers in Burmah Shell products besides being money-lenders. The course of dealings between the parties may be briefly stated thus. The defendant was a grower of potatoes and was dealing in them. He used to transport them to various places outside Nilgiris and he used to despatch such goods either by rail and present the railway receipt to the 2nd plaintiff and receive the value of potatoes by what is known in mercantile practice as discounting of bills and thereafter the railway receipt would be sent to its destination through a recognised bank. If the consignee fails to take the receipt by paying the value, necessary entries will be made in the accounts of the plaintiffs and the defendant would be debited with the said amount. But, if the consignee honours the railway receipt and pays for it then the credit entry in favour of the plaintiffs at the time of discount would automatically be wiped out by a debit entry as against it after the consignee honours the same. This course of conduct is reflected in the account books. The parties had such dealings ever since 1959 and in or about December, 1960 a sum of Rs. 50,026.03 became due and payable by the defendant to one or the other of the plaintiffs. An arrangement was thought of whereby the defendant was to secure the repayment of the aforesaid amount and, the parties contemplated to secure from the defendant a regular mortgage deed over his immoveable properties for which purpose the necessary non-judicial stamp to the value of Rs. 1,000 was purchased on 26th December, 1960. It is claimed that on 29th December, 1960 a memorandum of deposit of title deeds was drawn up under Exhibit A-26 in which the upper limit of Rs. 50,000 which was fixed as the limit of borrowing of the defendant was made out. But, soon thereafter, after the year 1960, the plaintiffs' case is that they advanced on three occasions under Exhibits A-11, A-12 and A-13 three sums of Rs. 5,500, Rs. 20,000 and Rs. 25,000

respectively and that in evidence of lending such cash necessary entries have been made in the books kept by the plaintiffs in the regular course of business and the relevant entries evidencing such payment of cash is claimed to be Exhibits A-15, A-16 and A-17. We have already seen that there were regular business transactions between the plaintiffs and the defendant in connection with the potato trade of the defendant. But the plaintiffs' case is that under Exhibits A-11, A-12 and A 13, they advanced cash to the defendant on the respective dates and these cash transactions were independent of the business dealings. In connection with the cash dealings, the plaintiffs' case is that the defendant deposited the title deeds in relation to his immoveable properties at Sukkirivarapet in Coimbatore on the 11th January, 1961 and after the execution of the promissory note, Exhibit A 13, and in order to make the security more clear and perfect a memorandum evidencing such deposit was taken under Exhibit A-14 dated 15th January, 1961. In this memorandum also, the upper limit up to which the defendant could borrow is fixed at Rs. 60,000. The plaintiffs would say that as the memorandum was in favour of the 2nd plaintiff by name, he became a mortgagee of such properties within the meaning of section 58 (*g*) of the Transfer of Property Act as by then the deposit of title deeds with intent to create an equitable mortgage thereon was effected and that Exhibit A-14 was only a memorandum recording a past transaction. The plaintiff claims that in the list of documents certain share certificates also were included, but he fairly concedes that he is not claiming any relief on them as no equitable mortgage as such could be created on such shares. Based on Exhibit A-14 which according to the plaintiff evidence an equitable mortgage, the suit has been brought after issuing a suit notice Exhibit A-8. We may at once state that the defendant replied under Exhibit A-9 denying liability and claiming that he had only one set of transaction *viz.*, the usual, normal business transaction and he never borrowed cash from the plaintiff and that the suit promissory notes were only intended to act as security, not as evidence of an independent borrowing as claimed by the plaintiff.

3. In the written statement filed, the defendant repeated what he averred in the reply notice, but set out more details as to under what head he was liable to the plaintiff and what was the amount that was payable by him at or about the time when the suit was brought. As plaintiff based his claim on Exhibit A-14 which according to him created an equitable mortgage, he filed the action in 1966 though the promissory notes are admittedly of the year 1961. The first and foremost defence taken up by the defendant was that no cash consideration was paid under the promissory notes and that he never handed over any title deeds at Coimbatore to the 2nd plaintiff with intent to create an equitable mortgage thereon and as there was no subsisting mortgage on which the plaintiff could sue upon, the suit based on the promissory notes, even if the consideration was true, is barred by limitation. Expatiating his case that there was only one set of dealing as between him and the plaintiff, the defence case is that a sum of Rs. 50,026-03 was due at the end of the year and more particularly on 31st December, 1963 and on 25th October, 1961 he paid a sum of Rs. 25,000 (which receipt is not in dispute) and that subsequent thereto, he had several normal business transactions with him and by about 1st December, 1961, the amount payable by him to the plaintiffs was about Rs. 24,981-92 and even according to the books of account kept by the plaintiffs the amount that could be claimed by either the 1st plaintiff or the 2nd plaintiff towards general dealings had between them was only Rs. 25,486-30 and in respect of this amount which fell due by the beginning of December, 1961 the defendant agreed to execute two usufructuary mortgages over his properties and pursuant to the understanding between himself and the plaintiff he did execute such usufructuary mortgages under Exhibits B-17 and B-18, but in favour of the nominees of the plaintiffs, for a sum of Rs. 40,000 and that this sum of Rs. 40,000 represents the principal amount of about Rs. 25,000 which was by then due by him as also the interest payable by him to the plaintiffs as per the arrangement and understanding between themselves. In any event, it is claimed that there were no independent cash

transactions and, particularly, under Exhibits A-11, A-12 and A-13, and if at all the defendant was due and owing any amount, it was under the general transactions and it was computed at the end of 1961 at Rs. 40,000 and for which purpose the two usufructuary mortgage deeds, Exhibits B-17 and B-18, were executed.

4. The defence case is that as there were multiplicity of dealings between himself and the plaintiffs in connection with his normal business, the clerk of the plaintiffs, examined as P.W. 2 in the case, used to obtain from him various documents holding out rosy promises that further and big advances would be obtained from the plaintiffs and it was in that fashion that the documents produced by the plaintiffs in O.S. No. 222 of 1966 came to be in their custody and that at no time the documents were ever handed over to the 2nd plaintiff at Coimbatore with intention of creating an equitable mortgage thereon.

5. We may in passing refer to the plaint in the suit in O.S. No. 222 of 1966. Whilst the plaintiffs are emphatic in the major part of the plaint that they are treating Exhibit A-14 as evidence of the creation of an equitable mortgage over the properties by deposit of title deeds, it is rather queer that they did not set it out as such in paragraph 11 of the plaint which is ordinarily considered to be an important paragraph under the caption "cause of action". The plaintiffs would say that the cause of action for the suit arose on 10th January, 1961, 11th January, 1961, 12th January, 1961 and 15th January, 1961 at Kotagiri and several places at Nilgiris where the properties are situated within the jurisdiction of the Court. It is singular that the main foundation of the action, which is the alleged deposit of title deeds at Coimbatore by the defendant which practically metamorphasised the action on the promissory notes to that of a cause of action, the alleged mortgage has not been adverted to specifically or even referred to by necessary implication. The defendant also claimed that he was an agriculturist and raised other defences which in our view need not be set out *in extenso.*

6. Whilst this suit was pending, the defendant instituted O.S. No. 152 of 1968. While repeating the nature of dealings had between him and the 1st plaintiff as a partnership firm in which the 2nd plaintiff is a partner and after admitting that he owed a sum of Rs. 50,026-03 at the end of 1960 towards which he paid a sum of Rs. 25,000 in the beginning of 1961, the defence case is that in respect of such an outstanding two usufructuary mortgage deeds under Exhibit B-17 and B-18 were taken in favour of the nominees of the plaintiffs. Contemporaneous with the execution of the usufructuary mortgage, two leases deeds were obtained as possession was not given by the defendant to the plaintiffs which entitled the defendant to continue in possession of the hypotheca but under which he was obliged to pay rent to the plaintiffs. In the suit for redemption (O.S. No. 152 of 1968) the defendant as plaintiff says that he is entitled to redeem the mortgages without any payment for the reason that no further amounts, other than the amounts found to be due under the general dealings were advanced by the plaintiffs under the various mortgages and that they were taken in the names of their nephews and admittedly it is a benami transaction and the transaction could only have an impact on the generality of the dealings which the defendant as a potato dealer had with the plaintiffs and that he did not borrow any amount much less a sum of Rs. 20,000 under each of the usufructuary mortgages referred to above. The substance of the plea in this suit also is that the defendant admits liability to pay the sums due under the general dealings which according to him was worked out to be Rs. 25,486-38 as per the account books of the plaintiffs themselves at the end of 1961 and that no more amounts were due by him by way of principal to the plaintiffs. In this context, the defendant filed this suit for redemption saying that he is entitled to redeem the mortgages without payment. To this, the plaintiffs who claimed that the mortgagees under Exhibits B-17 and B-18 are benamidars have filed a written statement. They would say that the mortgages are supported by consideration and they are valid and subsisting. They base their answer on an admission made by the plaintiffs in the written statement in O.S. No. 222 of

1966 and would say that the plaintiffs are not entitled to redeem without paying the entirety of the sum of Rs. 40,000.

7. The following issues were framed in O.S. No. 222 of 1966 :—

1. Whether the deposit of title deeds was made at Coimbatore on the 11th of January, 1961?

2. Whether the deeds were deposited with intent to create a mortgage, if so over what loans?

3. Whether the plaintiff is entitled to a mortgage decree and if so over what properties and on what amounts?

4. Whether the plaint promissory notes are not supported by cash consideration?

5. Whether the promissory notes were executed for balances on accounts between the plaintiff and the defendant and if so what is the correct amount due on the same?

6. Whether the payment of Rs. 25,000 by sale of the defendant's Mettupalayam house is true?

7. Whether all the accounts between the plaintiff and the defendant were not looked into and if the plaintiff did not take two usufructuary mortgages for Rs. 20,000 each in the name of his benamidars G. S. Natarajan and Sadasiva Mudaliar?

8. If so, whether the plaintiff is competent to maintain this suit and without offering to get his benamidars to surrender the usufructuary mortgages duly cancelled and surrendered?

9. Whether the alleged letter of 15th January, 1961 is admissible without being registered and whether it can operate to create a mortgage?

10. Whether the suit on the promissory notes are in time?

11. Whether the defendant is an agriculturist entitled to the benefits of the Madras Agriculturists Relief Act?

12. Whether the dealings of the 2nd plaintiff were on behalf of any joint family of which he was a manager?

13. Whether the 1st plaintiff is entitled to sue without an assignment in his favour in writing and registered?

14. Whether the suit is bad for misjoinder of the 1st plaintiff?

15. Whether the suit is bad for non-joinder of the other members of the joint family of the 2nd plaintiff?

16. Whether the suit is bad for non-joinder of the lessees of some of the plaint properties?

17. Whether the plaint items of properties are not correctly described?

18. To what relief, if any, is the plaintiff entitled?

8. The following issues were framed in O.S. No. 152 of 1968 :—

1. Whether the suit, as framed, is not maintainable ?

2. Whether proper Court-fee is paid?

3. Whether the usufructuary mortgages dated 1st December, 1961 stand redeemed without any payment ?

4. To what relief?

As we said, the learned Judge tried the suits together and rendered a common judgment. In the suit based on the promissory notes coupled with a memorandum which created, what according to the plaintiff an equitable mortgage, the learned Judge was satisfied that the promissory notes were supported by consideration and that the passing of consideration is evidenced by the account books kept by the plaintiffs in their regular course of business. He believed the evidence of P.W.1 (2nd plaintiff) and that of P.W.2 (their clerk). He would also place reliance upon the testimony of the accounts-clerk (P.W.3) and found that Exhibits A-15, A-16 and A-17 are reliable entries in the account-books of the plaintiffs on which a decree could be passed. He would also refer to the so-called admission made by the plaintiffs and would hold that the promissory notes are supported by consideration. He would understand the defendant's case one way *viz.*, that it could be the subject-matter of an independent account suit which he could file as against the plaintiffs. In the suit in O.S. No. 152 of 1968, he totally relied upon the recitals in the usufructuary mortgage deeds and believed the evidence of P.W. 1

and held that cash was paid under the aforesaid two mortgages as recited therein and that the mortgage deeds are, therefore, supported by consideration. In the result, therefore, he passed a preliminary decree in O.S. No. 222 of 1966 and passed a decree for redemption of the mortgage deeds provided the plaintiff paid the full mortgage amounts and on payment of the deficit Court-fee before the notified date. It is as against this common judgment that the present appeal has been preferred in both the suits by the defendant.

9. Before we go into the real issues which arise for consideration in this case, it is necessary to make general observations on the accounts kept by the plaintiffs. No doubt, on a *prima facie* examination of the account-books of the plaintiffs, it would be difficult to eschew them as those not kept in the regular course of business. But, it is not incredible as experience shows that even regularly kept account-books are sometimes used as a media for exposing false cases. The Courts, therefore, have to be particularly careful in examining such account-books with apparent mercantile cleanliness but which is attacked on the ground that they are unclean because of certain interpolations made therein and when the proof of such interpolations are very clear and positive even on a *prima facie* examination of the relative attacked entries. In the instant case, there could not have been cash dealings as claimed by the plaintiffs as between themselves and the defendant. Nevertheless, the plaintiff is emphatic that the suit promissory notes, Exhibits A-11, A-12 and A-13 are supported by cash consideration and that the passing of such consideration is proved in the recitals in entries Exhibits A-15, A-16 and A-17. We shall presently consider in detail the nature of such entries Exhibits A-15, A-16 and A-17. We are only referring to this at this juncture while dealing with the account-books of the plaintiffs only for the purpose of showing that in the instant case there was a specific attack on such recitals and the accent of the defendant was always on the fact that there was no general cash dealings between the plaintiffs and himself and at all material times he was dealing with the plaintiffs only in connection with his potato business and it is only in connection therewith he discounted the bills and obtained cash. The emphatic stand taken by the defendant is that at no time he borrowed cash from the plaintiffs for or in connection with his potato business. Therefore, it is for consideration whether the suit laid primarily on the promissory notes, but aided by Exhibit A-14, has to be accepted by raising the usual presumption under section 118 of the Negotiable Instruments Act. No doubt, special rules of evidence are provided for under the self-contained enactment *viz.*, the Negotiable Instruments Act. Section 118 says that until the contrary is proved *inter alia* the following presumption that every negotiable instrument was made or drawn for consideration shall be drawn. But, by now, it is well established that such a presumption is sometimes displaced by certain acceptable materials placed by the maker of the note which under such circumstances shifts the burden of proof from the maker to the payee. The presumption that could be raised under this section is only a *prima facie* presumption. If the maker of the note satisfies the conscience of the Court that at no time consideration passed under the negotiable instrument and that he executed it under certain circumstances which are not far from truth, then the ordinary presumption that consideration is presumed will not arise. As a matter of fact, Courts have laid down that the maker of the note or the defendant in an action on the promissory note may also rely upon circumstantial evidence and if those circumstances are compelling, the burden would likewise shift again to the payee or the plaintiff to establish the existence of consideration or at least its probability. In the instant case, not only in the reply notice, Exhibit A-9, but also in the written statement the defendant's specific stand was that no consideration passed under the promissory notes. In this situation, therefore, it is not unreasonable to expect that the circumstances are compelling in this case and the surrounding circumstances are thus far clear for the shifting of the burden of proof from the shoulders of the defendant—appellant to that of the plaintiff—payee.

10. With this background, we shall now examine the account-books of the plaintiffs to see whether on the 10th, 12th and

15th of January, 1961 the plaintiffs could have paid a sum of Rs. 5,500, Rs. 20,000 and Rs. 25,000 respectively. Exhibit A-15 is the entry in the day-book which according to the plaintiffs shows such payment of Rs. 5,500 on 10th January, 1961 which forms the consideration for the promissory note, Exhibit A-11. We have examined this entry. We find that even to the naked eye there is an interpolation in the regularly kept account. The entry is written with a different pen and with a different ink and it cannot be stated to be an entry which was made in the regular course. Even so Exhibit A-16. This is the last entry in that page written again by a different pen with a different hand with different ink and it stands solitarily alone to expose the plaintiffs' interpolation in a regularly kept account. Exhibit A-17 is said to be the entry in relation to the payment of Rs. 25,000 which according to the plaintiffs is the consideration for the promissory note, Exhibit A-13. Here again, the same pen and the same hand which caused the interpolations in Exhibits A-15 and A-16 have chosen to write up the entry as if Rs. 25,000 was paid to Kari Gowder, the defendant. Obviously, a show of genuineness is also attempted in this page. But we are of the view that the entry of Rs. 25,000 revealing a cash payment on that date of such an amount to the defendant is obviously brought into account in order to support the plaintiffs' case. An examination of the ledger which singularly brings these three disputed items of cash said to have been paid by the plaintiffs to the defendant again makes a revealing situation. We examined the index of the ledger. Upto page 79 there appears to be no misgiving about the entries in the ledger, but thereafter as to why the writer of the account went back to pages 34 and 42 is not clear. Obviously the plaintiff did not have the requisite cash in or about 10th January, 1961. Therefore, he invented the position that he borrowed the amount from one Pushiram Vishindas of Madras. He has not been examined. The mode in which the amount was borrowed has not been adverted to or proved. In order to provide themselves with cash, the plaintiffs, therefore, had to invent such a borrowing on their part from Pushiram Vishindas. This invented borrowing is also exposed in the day-book as the entry relating to it appears even to our naked eye to be an after-written affair. After having invented such a borrowing the writer of the ledger who went up to page 79 came back to 34 and entered this borrowing from Pushiram Vishindas at that page. It is not as if more pages are not available in the account-book. As a matter of fact, after page 81, several hundreds of pages are available for being written up, but the writer takes a step backward and uses pages 34 and 42 in order to sustain the cash lending of about Rs. 50,500 to the defendant. There is no explanation at all as to why this fact of going backward in the ledger was adopted by the plaintiffs who are not only money lenders, but experienced commercial businessmen. At page 42 of the ledger is an entry, Exhibit A-20, which is no doubt a consolidated entry, showing the alleged payments of Rs. 5,500, Rs. 20,000 and Rs. 25,000, making a sum of Rs. 50,500. But, as we said, this ledger entry is obviously in consonence with the entries which *prima facie* cannot be relied upon and these entries (Exhibits A-15, A-16 and A-17) in our view are interpolated in the day-book. If, therefore, Exhibits A-15, A-16 and A-17 are interpolations, it follows that Exhibit A-20, which is a follow-up of such entries, obviously cannot be credited and relied upon. Mr. T. R. Srinivasan appearing for the respondents in this appeal, is unable to place any contrary material before us to accept the plaintiffs' version that cash passed under these promissory notes and that the entries, Exhibits A-15, A-16 and A-17 are real and true. He also examined the account-books along with us in Court and was unable to efface the reasonable impression which follows from an examination of such entries that they are interpolations and interlineations in a regularly kept account for the purpose of creating the story that the plaintiffs paid cash consideration under Exhibits A-11, A-12 and A-13. We are unable, therefore, to accept the theory of the plaintiffs that the promissory notes, Exhibits A-11, A-12, and A-13, are supported by consideration. But what is pressed into service is that when the defendant was called upon to produce his accounts for which a notice to produce was also given the defendant did not pro-

duce such accounts and, therefore, the usual adverse inference should be drawn against the defendant. No doubt, such is one of the norms which Courts have fixed to themselves while appreciating the conduct of the litigant. But such an inference cannot be mechanically or automatically drawn in every case on the only basis that a litigant did not produce the account after he was called upon to produce the same. Each case has to be decided on its own merits. As we said, the ambulatory proof of a negotiable instrument, the proof of passing of consideration under a negotiable instrument is now shifted to the shoulders of the plaintiffs and as we are unable to exercise the discretion and raise the usual presumption under section 118 of the Negotiable Instruments Act, it is for the plaintiffs to establish that they paid cash under the three promissory notes. For this purpose, they wanted to rely on their accounts. We have examined the account-books and have made the observations found above which compel us to hold that the entries in the account-books in so far as this case is concerned appear to be entries which were brought in with a motive and they are not entries which could be said to have been made in the regular course of accounts-keeping. We, therefore, reject the theory that the promissory notes are supported by consideration.

11. One other aspect which we would like to state at this juncture is that the sum total of the alleged consideration which passed under the promissory notes almost represents the amount by then due by the defendant under the general dealings they had with the plaintiffs. This probabilises the defence version that he gave several blank signed sheets to P.W. 2 on various occasions in the hope of getting finances and advances from the plaintiffs in the general business and that such documents handed over to P.W. 2, who is an employee of the plaintiffs, have been misused. One other thing which strikes us is that the theory of the defendant that even if the promissory notes were signed by him, as claimed by the plaintiffs they were understood only as security documents for the amount due by him under the general dealings and not because any cash consideration was paid under them.

12. Even assuming that the presumption under section 118 of the Negotiable Instruments Act arises in this case and that cash consideration should be deemed to have passed under Exhibits A-11, A-12 and A-13, the plaintiffs have not come to Court on the basis of such a negotiable instrument, but on the basis that there has been a deposit of title deeds at Coimbatore by the defendant with intent to create an equitable mortgage over the properties listed out by the defendant under Exhibit A-14. It is on the strength of such an equitable mortgage said to have been created in their favour by such deposit that the plaintiffs have filed this suit long after the lapse of three years from the respective dates of the promissory notes in question.

13. The immediate point, therefore, for consideration is whether there could have been a deposit of title deeds by the defendant in favour of the plaintiffs at Coimbatore. In paragraph 4 of the plaint, the plaintiffs allege that on the 11th January, 1961 the defendant deposited his title deeds with the 2nd plaintiff at Coimbatore with intent to creat a security over the properties detailed in the schedule to the plaint. He would also add that the defendant also left a letter in plaintiffs' office at Mettupalayam on 15th January, 1961 mentioning the list of documents already deposited at Coimbatore. The said letter, according to the plaintiffs, was produced along with the plaint to prove the admission of the defendant that the deposit was made at Coimbatore. We have already noticed that even though the plaintiffs allege that there was such a deposit of title deeds with the intention of creating an equitable mortgage thereon, in the cause of action paragraph in the plaint there is no specific reference to it. Mr. T.R. Srinivasan, says that inartistic pleading can never be a ground for refusal of relief. We agree. But whether it is inartistic pleading or deliberate avoidance of a positive fact on which the case rests is a matter which has to be decided upon on the evidence and facts of the case.

14. We shall first consider whether the oral evidence let in this case regarding deposit of title deeds at Coimbatore is sufficient and clinching. Under section 58 (g) of the Transfer of Property Act in

certain metropolitan cities like Calcutta, Madras and Bombay and in any other town the State Government concerned may by notification in the Official Gazette specify a mortgage by deposit of title deeds known as equitable mortgage can be created. That could be created by the debtor delivering to the creditor or his agent the documents of title to immoveable property with intent to create security thereon. Firstly, the two limbs of the section which have to be necessarily complied with are delivery of title deeds relating to immoveable property in one of the specified towns and secondly such delivery or deposit was with intent to create a security thereon. These two factors act conjunctively and they cannot be dissociated under any circumstances whatsoever. As pointed out by our High Court in *The Chief Controlling Revenue Authority, Madras* v. *Messrs. Pioneer Spinners Private Limited*[1], the existence of the intention may be established by written documents alone or coupled with oral evidence, or oral evidence only, P.W. 1 in chief examination claims that he knows the defendant for 15 years and after stating that the promissory notes, Exhibits A-11, A-12 and A-13 were for cash consideration, said that the defendant delivered the documents of title to him at Sukravarappet in Coimbatore. He admits that no documents were given when he lent a sum of Rs. 5,500. When he gave a sum of Rs. 25,000 at Mettupalayam and obtained Exhibit A-13, he asked the defendant to give a list of documents and that the defendant gave such a list of documents at Mettupalayam. He denies that he received the documents at Kottagiri. He has not even whispered in the box that the said documents were handed over to him with intent to create a security thereon. What he says is that he asked the defendant to give a list of documents and such a list was given to him at Mettupalayam. The only document on which the plaintiffs rely upon is Exhibit A-14, the purport of which we shall presently consider. P.W. 1 admits that excepting Exhibit A-14 there is no other document to show that the title deeds were deposited at Coimbatore. P.W. 2 who is an employee of the 2nd plaintiff, corroborates P.W. 1 and would say that the title deeds and other documents were given to the plaintiffs at Coimbatore. He adds that at that time a document was proposed to be executed. P.W. 2's evidence is as follows :—

"He gave the title deeds and other documents to the plaintiff at Coimbatore. Then a document was proposed to be executed. The plaintiff paid money for purchasing stamp papers. The defendant represented that if the document was registered, his reputation would suffer and he offered to execute an equitable mortgage. He received back some of the documents. The defendant again wanted money from the plaintiff in January, 1961. P.W. 1 advanced him loans. P.W. 1 wanted security. The defendant deposited title deeds. The defendant was paid Rs. 5,500 on 10th January, 1961 at Mettupalayam. Exhibit A-11 is the promissory note executed by the defendant. Two days later, the defendant was paid Rs. 20,000. Exhibit A-12 is the promissory note executed by him. Two days later he was paid another Rs. 25,000. Exhibit A-13 is the promissory note executed by him. He delivered the title deeds to P.W. 1 at Coimbatore on the next day after he was paid Rs. 5,500. A list of memorandum was taken from him on 15th January, 1961 when Rs. 25,000 was paid to him."

P.W. 2 therefore, admits that though under the contemplated arrangements between the parties the stamps were purchased for executing a regular mortgage and though at that time certain documents were with P.W. 2, some of them were returned back. But what documents were taken back is not clear. He would mechanically add that he delivered the title deeds to P.W. 1 at Coimbatore on the next day after he was paid Rs. 5,500. He does not even say that such redeposit was made with the intention to create a security on those properties. The lower Court relied upon the judgment of the Delhi High Court in *Parkash Dev* v. *New Bank of India*[1], which says that physical

1. (1968) 1 M.L.J. 96: I.L.R. (1968) 2 Mad. 284 ; 80 L.W. 483 : A.I.R. 1968 Mad. 223 (F.B.)

1. A.I.R. 1968 Delhi 244.

delivery of documents by the debtor to the creditor is not the only mode of deposit. There may be a constructive deposit. A Court will have to ascertain in each case whether in substance there is a delivery of title deeds by the debtor to the creditor. If the creditor was already in possession of the title-deeds, it would be hypertechnical to insist upon the formality of the creditor delivering the title deeds to the debtor and the debtor redelivering them to the creditor. We are unable to hold this view in its entirety. Section 58 (*g*) contemplates delivery of documents which means actual delivery and not constructive delivery or constructive deposit. No doubt, in a case where the creditor is in possession of the title deeds of the debtor it may not be strictly necessary for him to redeliver the same to the creditor under certain circumstances if there is continuity in the transactions or if the parties intended that the original delivery is sufficient to constitute security for the later dealing. It all depends upon the facts of the case. But, in the instant case, what happened was that the title deeds were taken in order that a regular mortgage may be written up in connection with the general borrowing of the defendant. But what happened according to the plaintiffs is that apart from the debits under the general business account he advanced cash under three promissory notes which were undoubtedly different transactions and which have no link or connection with the general business. Therefore, independent delivery of the documents with intent to create an equitable mortgage is a necessary *sine qua non* before an encumbrance becomes attached to immovable property. If this according to us is the position, P.W. 2 has not even referred to the fact that the delivery of title deeds said to have been made at Coimbatore the next day after the execution of Exhibit A-11 was with the intention of creating a security thereon.

15. This is the nature of the oral evidence let in by the plaintiffs regarding the alleged deposit of title deeds. As we said, there is nothing clear and clinching in the testimony of either P.W. 1 or P.W. 2 to compel us to hold that such delivery of documents at Coimbatore at or about the time when the promissory notes were executed by the defendant after receipt of cash consideration was with the intention of creating a mortgage over the immoveable properties covered by such documents within the meaning of section 58 (*g*) of the Transfer of Property Act.

16. But P.W. 1 would say that excepting Exhibit A-14 there is no other document to show that the title deeds were deposited at Coimbatore. This would mean that Exhibit A-14 is the sole evidence which according to the plaintiffs would be sufficient to create an equitable mortgage over their properties by reason of the alleged deposit of title deeds at Coimbatore.

17. It, therefore, becomes necessary for us to examine Exhibit A-14 as the memorandum evidencing the deposit of title deeds and consider whether Exhibit A-14 by itself is sufficient in law to vest in the plaintiffs a right to enforce an equitable mortgage known to law. We have already referred to the two limbs of section 58 (*f*) of the Transfer of Property Act. An equitable mortgage or mortgage by deposit of title deeds consists of a transaction and a bargain. If both the transaction and the bargain are telescoped one with the other and they appear to be so integrated, then oral evidence is admissible to prove both. The transaction reveals the borrowing and the bargain depicts that there was a deposit of title deeds within the jurisdiction of a prescribed town with intent to create security. If, however, the bargain is reduced to writing, then the question often arises whether such writing is the sole repository of the evidence of the bargain or is it merely a memorandum or record of the past or earlier transaction which brings out the intention of the borrower to create an equitable mortgage over immoveable properties in connection with which alone the title deeds have been delivered or deposited. As no oral proof of writing is possible and indeed eschewed by the provisions of the Evidence Act, it becomes necessary to understand the true legal effect of the writing in case parties choose to reduce the bargain or their contract to writing. If at the time of borrowing, the title deeds are deposited or indeed handed over with no more incidents attached to it, but with intent to create a mortgage thereon, then the

presumption arises that the parties intended so and a mortgage has been created in accordance with section 58 (*g*). But, if as in the instant case as claimed by the plaintiffs if the transaction is followed up either contemporaneously or at any time later by a written bargain then the legal implications as to the above presumption is excluded. In *United Bank of India* v. *Lekhram S. & Co.*[1]. the Supreme Court quoted with approval the words of Lord Cairins in the leading case of *Shaw* v. *Foster*[2], thus:—

"Although it is a well established rule of equity that a deposit of a document of title without more, without writing or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply when you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the documents by which alone you must be governed."

There is, however, an exception to the above rule. If the writing or memorandum is a record of the past transaction and no more, and if we analyse the facts and circumstances of the case which obviously differ from one to the other, the writing is not so express as to make the writing as the sole and only bargain, then the implication in law that even at the time when the transaction was entered into accompanied by the deposit, the parties intended to create a mortgage may arise. As stated by the Supreme Court in *V. G. Rao* v. *Andhra Bank*[3], when parties creating security by deposit of title deeds intend to reduce their bargain regarding that deposit to the form of document, such document must be registered. But if on a proper construction and from the surrounding circumstances it is found that the parties did not intend to do so, then there being no express bargain the contract to create mortgage by deposit of title deeds arises by implication of law from the deposit itself and the document being merely evidential does not require registration. Bar of sections 91 and 92 of the Evidence Act does not apply to such document and correctness of recitals therein can be looked into. In *Rachpal Mahraj* v. *Bhagwandas Daruka*[1], Justice Patanjali Sastri, as he then was, summarises the law thus:—

"A mortgage by deposit of title deeds is a form of mortgage recognised by section 58 (*g*) of the Transfer of Property Act which provides that it may be effected in certain towns (including Calcutta) by a person "delivering to his creditor or his agent documents of title to immoveable property with intent to create a security thereon."

That is to say, when the debtor deposits with the creditor the title deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required under section 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. As the deposit alone is not intended to create the charge and the documents which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration under section 17 of the Indian Registration Act, 1908, as non-testamentary instrument creating an interest in immoveable property, where the value of such property is one hundred rupees and upwards. The time factor is not decisive. The document may be handed over to the creditor along with the title deeds and yet may not be registrable, as in *Obla*

1. (1965) 2 S.C.J. 91 : (1965) 2 An.W.R. (S.C.) 5 : (1965) 2 M.L.J. (S.C.) 5 : (1966) S.C.D. 44 : A.I.R. 1965 S.C. 1591.
2. (1872) 5 H.L. 321, 341.
3. (1971) S.C.D. 1097 ; A.I.R. 1971 S.C. 1613.

1. (1950) 2 M.L.J. (S.C.) 350 : 1950 S.C.J. 361 ; (1950) S.C.R. 548; A.I.R. 1950 S.C. 272.

Sundaracharìar v. *Narayana Ayyar*[1], or it may be delivered at a later date and nevertheless be registrable, as in *Hari Sankar Paul* v. *Kedar Nath Saha*[2]. The crucial question is: Did the parties intend to reduce their bargain regarding the deposit of title deeds to the form of a document? If so, the document requires registration. If, on the other hand, its proper construction and the surrounding circumstances lead to the conclusion that the parties did not intend to do so, then, there being no express bargain, the contract to create the mortgage arises by implication of the law from the deposit itself with the requisite intention, and the document, being merely evidential does not require registration."

18. Thus it is seen that if the letter or writing between the borrower and the lender on its true understanding and in the light of the surrounding circumstances is evidence of a past transaction, then that instrument or letter or writing does not create a mortgage by itself. What is needed is that the writing on the face of it and on a rational and normal interpretation of it should give that it was under that letter, writing or instrument that the mortgage was created. In other words, the writing should have an operational effect, but should not be purely evidential in scope. In the light of this position of law as above by judicial precedents, we shall now take up Exhibit A-14 which is said to be the only document to show that the title deeds were deposited at Coimbatore and see whether this story of the plaintiffs is acceptable and what is its legal effect. Exhibit A-14 is a document written by an expert. The writer was a retired Sub-Registrar who is obviously conversent with the intricacies attached to such writings. Though it is captioned as as list or memorandum executed by the defendant in favour of the plaintiffs, it is in effect a deed of equitable mortgage executed as between Chinnathambi Chettiar on the one hand and Kari Gowder on the other. The words deployed to name this instrument is "எழுதிக் கொடுத்த" equitable mortgage "என்னவென்றால்": By no stretch of imagination it can be said that after the parties executed solemnly a writing like Exhibit A-14 it is not the sole repository of the bargain between the parties, but it is a record of a past transaction. We cannot lightly ignore the description given by the parties to this instrument as a deed of equitable mortgage executed as between one and the other. After mentioning the outer limit up to which Kari Gowder could borrow, the parties say that as security for such lending assured by Chinnathambi Chettiar and as security thereof, the documents relating to the properties described in Exhibit A-14 were deposited by Kari Gowder at Coimbatore. At this juncture, it is for us to consider whether the intent to create a security on the property resulting in a mortgage by deposit of title deeds was ever thought of at all even assuming that the title deeds were delivered at Coimbatore. Once they have unequivocally reduced the bargain into writing and expressed that one is creating an equitable mortgage in favour of the other under it, and in that context referred to the deposit of certain title deeds at Coimbatore, it would not mean that the deposit made at Coimbatore was not with intent to create security, but it is only under Exhibit A-14 that such an intention was made clear.

19. If Exhibit A-14, therefore, is the bargain between the parties or the sole evidence by which the borrower intended to offer his properties as security, then undoubtedly Exhibit A-14 requires registration under section 14 of the Indian Registration Act as a non-testamentary instrument creating an interest in immoveable property. If Exhibit A-14 is understood in that line, then it is inadmissible in evidence and cannot fix any right much less a right as a mortgagee to enforce the security in a manner known to law.

20. Not only on the ground that the promissory notes are not supported by consideration but also on the ground that there is no clinching evidence that

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1. (1931) 60 M.L.J. 506 : L.R. 58 I.A. 68: I.L.R. 54 Mad. 257 (P.C.): A.I.R. 1931 P.C. 36.
2. (1939) 2 M.L.J. 522 : L.R. 66 I.A. 184: I.L.R. (1939) 2 Cal. 243 (P.C.) : 50 L.W. 33: A.I.R. 1939 P.C. 167.

the title deeds were deposited at Coimbatore and also for the reason that Exhibit A-14 which according to us is the sole repository of the bargain between the parties is a compulsorily registrable instrument and that not having been registered the suit laid by the plaintiffs on the foot that Exhibit A-14 created such a mortgage in their favour is not maintainable and has, therefore, to be dismissed. On the first ground that the promissory notes were not supported by consideration the suit also fails. The lower Court was, therefore, wrong in having decreed the suit.

21. The appeal, A.S. No. 295 of 1970 is, therefore, allowed with costs.

22. The other question for consideration is whether the decree of the lower Court in O.S. No. 152 of 1968 would stand as it is. The lower Court no doubt came to the correct conclusion that the plaintiff could only redeem the property by paying the sum of Rs. 40,000 which is the amount mentioned in the two usufructuary mortgage deeds, Exhibits B-17 and B-18. But the question is whether the plaintiff, in the sense the defendants in O.S. No. 152 of 1968, should succeed on the ground that the usufructuary mortgage deeds are supported by consideration or on the material which has been referred to by us and also the lower Court and which facts are not in dispute before us. In so far as the usufructuary mortgage deeds. Exhibits B-17 and B-18 are concerned, admittedly they are taken one in the name of the nephew and another in the name of the friend. They have been impleaded as defendants 2 and 3 in the present action. The 1st defendant concedes in this suit that they were only name-lenders and that he lent the money from the saving from agricultural income. But the 1st defendant is a businessman who is regularly keeping accounts in respect of his business. Being a businessman, he ought to have kept accounts in respect of his private income elsewhere. No such account has been produced. Excepting for the bare *ipse dixit* of the 1st defendant in this suit, there is no evidence before us to show that Exhibits B-17 and B-18 are supported by consideration. We asked Mr. T. R. Srinivasan to substantiate from any exhibited document or from acceptable oral testimony to prove that Rs. 20,000 passed under each of these documents. He was unable to place before us any such material. It is in these circumstances we should consider the version of the plaintiff in the suit. The plaintiff's case is that under the general dealings which he admittedly had with the 1st defendant, a sum of Rs. 50,926.03 became due by the beginning of 1961 and that he paid a sum of Rs. 25,000 towards these dues and by the end of 1961, it was agreed that towards the discharge of this debt, the plaintiff should execute two usufructuary mortgage deeds over his properties. The version of the plaintiff in this suit is that it was agreed that the figure of Rs. 40,000 was arrived at taking into consideration the interest payable on the earlier dues of the plaintiff to the 1st defendant and it was in that context that the figure of Rs. 40,000 was arrived at and later the usufructuary mortgages under Exhibits B-17 and B-18 were entered into. This version of the plaintiff is probable and is also substantiated by the defendant's own account books. The ledger of the 1st defendant in connection with the general business has been produced. That shows a debit entry on the 1st of January, 1961 and Rs. 50,026.03. This is at page 399 of the ledger which has not been independently marked but which we are marking as Exhibit C-1. At page 408 of Exhibit C-1 this account is carried forward and is closed at the end of December of the year 1961. This takes into consideration the sum of Rs. 25,000 paid by the plaintiff. But there appears a debit to the value of Rs. 442.27 in this account. That is why we see at page 408 of Exhibit C-1 that the amount of Rs. 24,981.92 which ought to be the only debit as against the plaintiff in respect of the general dealings, is increased to Rs. 25,486.38 instead of remaining at Rs. 24,981.92. It is in full settlement of this general account which resulted in the debit of Rs. 25,486.38 the plaintiff claims that the two usufructuary mortgage deeds were entered into by adding on the interest which the plaintiff agreed to pay to the 1st defendant in respect of prior dealings. It is also seen

that at page ?99 in Exhibit C-1 the 1st defendant omitted to add on the sum of Rs. 50,026.03. As to why he did so is not clear. But in the same Exhibit C-1 at page 408, he once again brings this debit of Rs. 50,206-03 at the end of the year and adds or Rs. 442.27 to it and makes up a debit of Rs. 25,486-38. This obviously appears to be the only amount due by the plaintiff to the defendants in the course of the general dealings between him and the 1st defendant. It is in respect of this that these usufructuary mortgages have been executed though for an agreed larger amount, but on an understanding of the account, as disclosed by the 1st defendant himself. It is seen that no further amount is due by the plaintiff under the general dealings and that all such debits have become merged in the consideration recited though not paid under Exhibit B-17 and B-18. As justice should be done and also seem to be done, we are not inclined to allow the suit for redemption without payment. But as Mr. V. K. Thiruvenkatachari for the appellant himself fairly concedes that his client owes the suit sum of Rs. 25,486.38 being the debit as against him in the general account at the end of 1961 and which was raised to the figure of Rs. 40,000 by consent, we accept the probable version of the plaintiff and decree the suit for redemption on the plaintiff depositing the full mortgage amount within three months from this date and also on payment of the required deficit Court-fee, if not already paid. The appellant in A.S. No. 294 of 1970 shall pay the counsel's fee in this appeal. Any amounts paid by the appellant in these proceedings during the pendency of this appeal shall also be taken into consideration at the time of final ascertainment of the amount payable by the plaintiff to redeem the mortgage.

R.S. —— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*S. Natarajan, J.*

A. Subbu Naidu .. *Appellant**

v.

Rajammal *alias* **Thayammal** .. *Respondent.*

Hindu Succession Act (XXX of 1956), section 14 (1) and (2)—Scope and applicability—Death of male member in 1939, leaving agricultural land and surviving him two wives, a daughter by one of them and a son by the other—Suit properties given subsequently to widow with daughter for her maintenance enjoying usufruct—Widow's death in 1969—Claim by the son of the other widow to the property—Neither the Hindu Women's Rights to Property Acts 1937 and 1947 nor section 14 (1) of the Hindu Succession Act applies.

The Hindu Women's Rights to Property Act, 1937, did not apply to agricultural land. A right to agricultural lands was created in favour of Hindu women only by Act XXX of 1947, and therefore any earlier death of a male holder will not confer on a Hindu woman a right in agricultural lands. [*Para.* 6.]

In the instant case, at the time the lands were given to the widow she had no pre-existing right to a share in her husband's properties and the subsequent grant could not have the effect of conferring on her a right which was non existent. The grant was only for a limited purpose and for a limited time and would automatically cease when the time ran out; a limited grant in lieu of maintenance would be nothing more than a restricted estate as contemplated in section 14 (2) of the Hindu Succession Act, 1956. [*Paras.* 6, 7.]

Cases referred to:

Eramma v. *Veerupana,* (1966) 2 S.C.R. 626: (1967) 1 S.C.J. 746 : A.I.R. 1966 S.C. 1879; *Naraini Devi* v. *Ramo Devi,* (1976) 1 S.C.C. 575 ; *Chellammal* v. *Nallammal,* (1971) 1 M.L.J. 439; *S. Kacha-*

* S.A. No. 971 of 1973. 4*th March,* 1976.

paiaya v. *V. Subramania*, 85 L.W. 202 : A.I.R. 1972 Mad. 279; *Pattabhiramayya* v. *Parijatham Ammal*, (1970) 2 M.L.J. 331 : 83 L.W. 36 : A.I.R. 1970 Mad. 257; *V.S. Reddi* v. *Tulasamma*, A.I.R. 1969 A.P. 300 ; *Gurunadham Chetti* v. *Navaneethammal*, 80 L.W. 253: (1967) 1 M.L.J. 454: I.L.R. (1968) 1 Mad. 567: A.I.R. 1967 Mad. 429 ; *Thayammal* v. *Selammal*, (1971) 2 M.L.J. 286 : 84 L.W. 575; A.I.R. 1972 Mad. 83.

Appeal against the decree of the Court of the Subordinate Judge, Madurai in Appeal Suit No. 141 of 1972 preferred against the decree of the Court of the District Munsif of Madurai Taluk in Original Suit No. 23 of 1971.

N.V. Balasubramaniam, for Appellant.

P. Ananthakrishnan Nair, for Respondent.

The Court delivered the following

JUDGMENT.—The trial Court and the appellate Court have concurrently found against the plaintiff, the appellant herein and dismissed his suit for possession and for mesne profits. As may be presently seen, the dismissal of the suit is purely due to a failure of the Court below to understand the scope of section 14 (1) and section 14 (2) of the Hindu Succession Act, 1956.

2. The appellant's suit came to be filed in the following circumstances. One Ayyalu Naidu derived some properties in a family partition as evidenced by Exhibit A-2 dated 26th September, 1938. He had two wives, Krishnachi Ammal who is the mother of the respondent and Krishnaveni Ammal, the mother of the appellant. He died on 10th January, 1939 leaving the appellant as the sole coparcener of the erstwhile joint family. The suit properties which are of an extent of 1.56 acres were given sometime after the death of Ayyalu Naidu to Krishnachi Ammal for enjoying the usufruct therefrom towards her maintenance. Krishnachi Ammal died on 19th November, 1969. Thereafter the appellant claimed that the properties should revert back to him and therefore, made a demand on the respondent to surrender possession. As the demand was refused, the appellant filed his suit. The contention of the appellant was that Krishnachi Ammal had no right whatever in the properties of his father and therefore, the entire properties left behind by Ayyalu Naidu had been inherited by him. The giving of the suit properties to Krishnachi Ammal in lieu of her maintenance was by a family arrangement and therefore, the right given to her got extinguished on her death and did not get enlarged under section 14 (1) of the Hindu Succession Act so as to entitle the respondent to claim a right over them.

3. The respondent raised various contentions in the suit. She firstly stated that her mother had a right in the properties left behind by Ayyalu Naidu and therefore, the suit properties were taken by her mother in her own right and not as a result of any concession. It was her further case that the suit properties were not given to her mother in lieu of maintenance. A post-card, Exhibit B-21 dated 25th October, 1955 written by the appellant to Krishnachi Ammal and the respondent was also projected to contend that therein the appellant had conceded the right and title of Krishnachi Ammal to the suit properties and therefore he was estopped from going back on that admission and claim the properties as belonging to him. The last of the defences was that prior to the filing of the instant suit, the appellant had filed O.S. No. 103 of 1970 against the lessee in occupation of the lands and tried to recover possession from him and in that suit, it had been held that the appellant was not the lessor and therefore, the judgment in that suit would operate as *res judicata*.

4. The trial Judge as well as the appellate Judge took the view that by reason of the Hindu Women's Rights to Property Act, 1937, as extended to agricultural lands by the Hindu Women's Rights to Property Act of 1947, Krishnachi Ammal was entitled to a share in her husband's properties and therefore, the limited estate derived by her became enlarged by virtue of section 14 (1) of the Hindu Succession Act, 1956. Alternately, they took the view that since the properties had been given to Krishnachi Ammal in lieu of maintenance, it must be held that the suit properties had been acquired by Krishnachi Ammal in lieu of maintenance and therefore, the case would fall under

section 14 (1) of the Hindu Succession Act. The further finding was that the admission made by the appellant in the postcard written by him, would estop him from denying the respondent's title to the suit properties and setting up title in himself.

5. Mr. S.G. Ramachandra Iyer, the learned counsel for the appellant, contends that the judgments of the Courts below are patently erroneous since each one of the findings against the appellant is not in accordance with law. It is firstly contended that Krishnachi Ammal could not have derived any right under the Hindu Women's Rights to Property Act, 1937, as amended by Act XI of 1938 because the properties left behind by Ayyalu Naidu were all agricultural lands. It is further contended that the operation of the 1937 Act was extended to agricultural lands in the State of Tamil Nadu only by Madras Act XXVI of 1947 and that Act did not have retrospective effect. Both these contentions have to be accepted as they are unassailable. Consequently it follows that on the death of Ayyalu Naidu in the year 1929, his widows were not entitled to claim any right in his properties and the entire properties would have been inherited by the appellant as the sole surviving co-parcener. The Courts below were therefore, not correct in holding that by reason of the Hindu Women's Rights to Property Act, 1937 and the Act XXVI of 1947, Krishnachi Ammal became entitled to a share in the properties of her husband.

6. The other finding of the Courts below that since the suit properties had been given to Krishnachi Ammal in lieu of maintenance, it has to be held that the case would fall under section 14 (1) of Act XXX of 1956 is also clearly erroneous. There are a number of pronouncements of this Court as well as the Supreme Court which precisely point out the conditions and circumstances under which a female Hindu possessed of property as a limited owner could claim enlargement of the estate under the provisions of the Act. It is not every case of possession of property by a female Hindu that would attract the operation of section 14 (1). It is unnecessary for me to dilate more on the subject as the position can be more succinctly set out by reference to the ratio in decided cases. *Eramma* v. *Veerupana*[1], was a case, where, after the death of a sole male holder in the year 1936-37, his two step-mothers got into possession of the properties left by him. The nearest heirs of the last male holder claimed the properties and filed a suit to recover possession. During the pendency of the proceedings, Act XXX of 1956 came to be enacted and therefore, the step-mothers claimed that they had become full owners of the properties in their possession. This contention was repelled by the Supreme Court and it was pointed out that they had no right whatever in the properties at the time of the last male holder's death and therefore, their possession of the properties could only be that of trespassers and therefore, they were not entitled to claim any enlargement of the estate. The Supreme Court then pointed out the circumstances under which a female Hindu can validly claim a property in her possession to have been acquired as contemplated under the Act, in the following words :

> "The Explanation to sub-section (1) of section 14 defines the word 'property' as including 'both movable and immovable property acquired by a female Hindu by inheritance or devise....' Sub-section (2) of section 14 also refers to acquisition of property. It is true that the Explanation has not given any exhaustive connotation of the word 'property' but the word 'acquired' used in the Explanation and also in sub-section (2) of section 14 clearly indicates that the object of the section is to make a Hindu female a full owner of the property which she has already acquired or which she acquires after the enforcement of the Act. It does not in any way confer a title on the female Hindu where she did not in fact possess any vestige of title."

Yet another case, *Naraini Devi* v. *Ramo Devi*[2], also throws light on the scope and effect of sub-sections (1) and (2) of section 14. That was a case where one Naraini Devi, whose husband died in the year 1925, was given certain properties in an award on 4th January, 1946 for enjoy-

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1. (1966) 2 S.C.R. 626; (1967) 1 S.C.J. 746; A.I.R. 1966 S.C. 1879.
2. (1976) 1 S.C.C. 575.

ment during her life. The question then arose as to whether the properties given under that award would become her absolute properties by reason of section 14 (1) of the Hindu Succession Act. The Supreme Court held against the widow and observed as follows :

"In the present case. Smt. Naraini Devi's husband died in 1925. In the presence of her sons, the widow did not get any share or interest in the house left by her husband under the Hindu Law as then applicable. In short, she had no pre-existing right or interest in the house in question. It was the award dated 4th January, 1946, that created a restricted estate for her in the house in question. Her case thus falls squarely within the ambit of sub-section (2) of section 14 of the Hindu Succession Act. Her interest therefore, came to an end on her death which took place during the pendency of these proceedings."

The ratio in this case would directly apply to the facts of the present case. Since Ayyalu Naidu died in 1939, long before Act XXX of 1947 was enacted, it follows that in the presence of the appellant the widows of Ayyalu Naidu did not get any share or interest in the lands left behind by him. The arrangement by which Krishnachi Ammal was subsequently given the suit properties in lieu of maintenance created only a restricted estate as referred to in section 14 (2) of the Act. The Courts below seem to have been influenced by the fact that the Hindu Women's Rights to Property Act, 1937 was passed before the death of Ayyalu Naidu. But that enactment can have no impact whatever on the landed properties left behind by him. A right in agricultural lands was created in favour of Hindu women only by Act XXX of 1947 and therefore, any earlier death of a male holder will not confer on a Hindu Woman a right in agricultural lands.

7. The Courts below also seem to have placed reliance on the decision of Ramamurthi, J., in *Chellammal* v. *Nallammal*[1], to hold that Krishnachi Ammal had a vested interest in the properties of her husband. But, that judgment has been over-ruled by a Division Bench of this Court in *S. Kachapaiaya* v. *V. Subramania*[1]. In that case the entire case-law on the subject had been elaborately considered. After noticing *Pattabhiramayya* v. *Parijatham Ammal*[2]; *V. S. Reddi* v. *Tulosamma*[3]; *Gurunandham Chetti* v. *Navaneethammal*[4] and *Thayammal* v. *Selammal*[5], the Bench held that if a Hindu widow had obtained certain lands for maintenance for the first time under a compromise or a decree or award etc., she got only a life estate and not an absolute estate and as per the intendment of the parties at the time of the arrangement, the property would revert to the joint family and therefore, the case would fall under section 14 (2) of the Hindu Succession Act. In the light of these decisions, it may be seen once again that the giving of the properties to Krishnachi Ammal was a limited and restricted grant and would not have the effect of enlarging her rights by reason of section 14 (1). At the time the lands were given to her, she had no pre-existing right to a share in her husband's properties and the subsequent grant could not have the effect of conferring on her a right which was non-existent. The grant was only for a limited purpose and for a limited time and would automatically cease when the time ran out. Unfortunately, the Courts below have construed the words 'acquired by a female Hindu.... in lieu of maintenance or arrears of maintenance' occurring in the Explanation to section 14 (1) to mean that every case of possession of property by a female Hindu in lieu of maintenance would fall under section 14 (1). That is certainly not the law and that is not the provision contained in section 14 (1). A limited grant in lieu of maintenance would be nothing more than a restricted estate as contemplated in section 14 (2).

8. With regard to the other finding of the Courts below *viz.*, that Exhibit B-21 would operate as estoppel, that finding

1. (1971) 1 M.L.J. 439.

1. 85 L.W 202 : A.I.R. 1972 Mad. 279.
2. (1970) 2 M.L.J. 331: 83 L.W. 36: A.I.R. 1970 Mad. 257.
3. A.I.R. 1969 Andh. Pra. 300.
4. (1967) 1 M.L.J. 454 : (1967) 80 L.W. 253: I.L.R. (1968) 1 Mad. 567 : A.I.R. 1967 Mad. 429.
5. (1971) 2 M.L.J. 286: 84 L.W. 575 : A.I.R. 1972 Mad. 83.

too is clearly unsustainable. The post card was written in the year 1955 when Krishnachi Ammal was admittedly alive. Having regard to the fact that the suit lands had been given earlier to Krishnachi Ammal for enjoyment during her life time, it necessarily follows that the appellant had stated nothing more in the letter than acknowledging Krishnachi Ammal's right to be in possession of the lands during her life time. Merely because he has stated therein that the respondent was also entitled to the properties along with her mother, it cannot mean that the limited grant in favour of Krishnachi Ammal became enlarged into one of an absolute grant. In any event, there is no question of estoppel against title. In so far as the appellant's suit, O.S. No. 103 of 1970 against the lessee is concerned, it is seen that the lease had been created by either Krishnachi Ammal or the respondent. In such circumstances, the lessee was entitled to resist the appellant's suit in ejectment and contend that the appellant was not his lessor and therefore, he was not entitled to terminate the lease and ask for possession. The decision in that suit can have no effect whatever on the controversy between the parties in the present action. In the result, the appeal succeeds and will stand allowed. The judgments of the Courts below will stand set aside and the appellant's suit will stand decreed. Having regard to the relationship between the parties, they are directed to bear their respective costs throughout. The appellant will, however, be entitled to mesne profits from the date of suit, the quantum of which is directed to be decided in separate proceedings under Order 20, rule 12 of the Civil Procedure Code. No leave.

R.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P.R. Gokulakrishnan, J.*

Sri. Pamban Kumaragurubara Swami Temple Tiruvanmiyur, by its Trustee T. T. Kuppuswamy Chettiar ... *Petitioner**

v.

K. Subramanya Mudaliar ... *Respondent.*

Civil Procedure Code (V of 1908), section 24—Petition for transfer—Convenience of parties one criterion—Suit transferred.

The petitioner filed a petition for transfer of the suit filed by the respondent on the file of the Principal Subordinate Judge, Chingleput for possession of the suit property situated at Tiruvanmiyur, to the City Civil Court, Madras. The petitioner had stated that he was old, that most of the witnesses were residing in Madras and that Tiruvanmiyur was nearer to Madras than Chingleput. The respondent objected to this.

Held: Section 24 of the Civil Procedure Code was wide enough to confer powers upon the High Court and the District Court for the purpose of transferring a suit. The convenience of the parties concerned was one of the *criteria* for the purpose of transferring the suit. It was clear from the facts of the case that the Court in the City of Madras was nearer to the suit property, than the Chingleput Court. In the circumstances of the case, the suit would stand transferred to the file of the Original Judge, City Civil Court at Madras.

[*Para.* 5.]

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to transfer O.S. No. 65 of 1972 on the file of the Court of the Principal Subordinate Judge, Chingleput to the file of the City Civil Court, (Principal Judge), Madras.

P. Venkataswami, for Petitioner.

T.V. Ramanujam, for Respondent.

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* Transfer Civil Misc. Petn. No. 10533 of 1975. 29*th March*, 1976.

The Court made the following

ORDER.—This is a petition to transfer O.S. No. 65 of 1972 on the file of the Principal Subordinate Judge's Court, Chingleput, to the Principal Judge, City Civil Court, Madras. The transfer is prayed for only on the ground of convenience. The respondent therein has filed O.S. No. 65 of 1972 on the file of the Principal Subordinate Judge, at Chingleput for getting possession of 52 cents of land purchased by him in R.S. No. 172/2 at Tirnvanmiyur village. In respect of this land, the petitioner submits that the same is part of the land purchased by him as early as 4th June, 1929. Under that purchase, the petitioner has acquired 3 acres and 11 cents wherein the Samadhi of Pamban Swami is situated. As per the allegation in the transfer petition, the petitioner has covered it with a fence wherein the Samadhi of Pamban Swamigal stands. It is further contended by the petitioner that both the plaintiff and the defendant in the suit are residents of Madras, that Thiruvanmiyur is nearer to the City Civil Court at Madras, rather than to the Chingleput Sub-Court, that almost all the witnesses, both who know the facts and also worshippers therein are within the jurisdiction of the City Civil Court, Madras, that the petitioner is aged more than 78 years suffering from blood pressure, that most of the witnesses who have to be taken for the purposes of giving evidence in the suit who are all residing at Madras are all aged persons, and that in the interests of all the parties concerned, it is better thatthe suit is transferred to the City Civil Court, Madras.

2. This transfer petition is opposed on the ground that the petition for transfer is belated, that settlement proceedings were conducted at Chingleput, wherein the petitioner also gave evidence, that the settlement proceedings ended in favour of the respondent herein, and as such, there is no merit in the defence put forth by the petitioner herein in the main suit, and that the property is situate within the jurisdiction of the Chingleput Court, and as per section 16, Civil Procedure Code the suit has to be tried only at the Chingleput Court.

3. I have been taken through the facts of the case in detail and also the affidavits filed by the respective parties herein. No doubt, section 16 of the Civil Procedure Code says that:

"Subject to the pecuniary or other limitations prescribed by any law, suits—

(a) for the recovery of immovable property with or without rent or profits;

(b) for the partition of immovable property;

(c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;

(d) for the determination of any other right to or interest in immovable property;

(e) for compensation for wrong to immovable property;

(f) for the recovery of movable property actually under distraint or attachment, shall be instituted in the Court within the local limits of whose jurisdiction the property is situate."

4. There is no difficulty in appreciating the provisions of section 16, and also the correctness of the suit filed before the Chingleput Court. But the transfer is prayerd for only under section 24 of the Civil Procedure Code. Section 24 gives general power of transfer and withdrawal. It states:

"On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice the High Court or the District Court may, at any stage—

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court Subordinate to it and competent to try or dispose of the same; or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn."

5. Thus, it is clear section 24 is wide enough to confer powers upon the High and the District Court for the purpose of transferring a suit. The convenience of the parties concerned is one of the criteria for the purpose of transferring the suit. No doubt, the suit is of the year 1972. It was posted in the ready list only during 1975. Immediately, the petition for transfer has been filed. Unfortunately the transfer petition was pending for over six months now. That need not stand in the way of appreciating the facts alleged by the petitioner herein to have the transfer he has prayed for. It is clear from the facts of the case that the Court at the City of Madras is nearer to the suit property, rather than the Chingleput Court. The settlement proceedings referred to above ought to have been conducted either at Saidapet or at Chepauk, Madras-5. There is no difficulty in appreciating the fact that both the plaintiff and defendants reside at Madras and the petitioner herein is aged more than 78 years having blood pressure.

6. Very strong ground has been made out on the basis of convenience to all the parties concerned to order the transfer as prayed for.

7. In these circumstances, O.S. No. 65 of 1972 on the file of the principal Subordinate Judge's Court, Chingleput, will stand transferred to the file of the Principal Judge, City Civil Court at Madras. It is open to the Principal Judge, City Civil Court, Madras, to have the same posted before any of the Judges presiding over the City Civil Court. Since the suit is of the year 1972, the Principal Subordinate Judge, Chingleput, will take immediate steps to have the papers transmitted to the Principal Judge, City Civil Court, Madras, immediately. The Principal Judge, City Civil Court, Madras, will give necessary directions for the purpose of disposing of the suit on or before 30th of July, 1976. There will be no order as to costs.

S.J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Suryamurthy, J.*

T. M. Santhakumari .. *Petitioner**

v.

Narasingha Mudaliar and others .. *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 14 (1) (2)—*Petition for eviction of tenants—Demolition and Reconstruction*—Bona fides *a question of degree in each case.*

Bona fides is a question of degree. *Bona fides* has to be assessed with reference to the circumstances and facts of each particular case and in the context and framework of the situation prevailing at that time. The situation here is that the building does require to be demolished on account of its dilapidated condition. The landlady is bound to give an undertaking that the work of demolishing any material portion of the building shall be substantially commenced by her not later than one month and shall be completed before the expiry of three months from the date she recovers possession of the entire building or before the expiry of such further period as the Controller may fix by reason of section 14 *(2) (b)* of the Tamil Nadu Buildings (Lease and Rent Control) Act. If she fails to do so the tenants can seek recovery under section 16 of the aforesaid Act. [*Para.* 4.]

In the circumstances of the case the landlady was held entitled to evict the tenants for the purpose of demolition and reconstruction. [*Para.* 5.]

Cases referred to :—

N.A. Ramanatha Iyer v. *Bathul Bai*, (1971) 2 M.L.J. 383; *Chandra Valli* v. *Sha Poonamchand*, (1975) T.L.N.J. 266.

Petitions under section 25 of Act XVIII 1960 as amended by Act XXIII of 1973 read with section 115, Civil Procedure Code praying the High

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* C.R.Ps. Nos. 1709 to 1714 of 1975. *23rd March,* 1976.

Court to revise the order of the Court of the Small Causes, Madras, dated 26th February, 1973 and made in H.R.A. Nos. 441 to 446 of 1972 respectively. (H.R.C. Nos. 605, 609, 19, 604, 608 and 18 of 1970 respectively; Rent Controller, Madras.

T.K. Subba Rao, *S.N. Balaraman* and *K.V. Rajan*, for Petitioner.

U. Somasundaram and *P. Devadass*, for Respondents.

The Court delivered the following

JUDGMENT.—These civil revision petitions, six in number, have been preferred against the order of the learned appellate authority reversing the order of the learned Rent Controller directing the eviction of the tenants. The respondents in all the civil revision petitions are in occupation of different portions of the building belonging to the civil revision petitioner herein as tenants from month to month. The landlady filed six petitions for their eviction on the ground that she wanted possession of the building for the purpose of demolition and reconstruction. The learned Rent Controller found that the petitions were *bonafide*, that the landlady had done all that she need do at that stage, as preparation for demolition and reconstruction of the building, that the building was sufficiently old to require demolition and reconstruction and that the landlady had sufficient means to demolish the building and reconstruct another building on the site thereof. However, on appeal the learned appellate authority took a different view. The learned appellate authority refused to accept the view of the learned Rent Controller that the mere fact that the application for constructing a building on the site of the existing building after demolishing the latter was filed subsequently, does not discredit the case of the landlady. The appellate authority took the view that the application should have been filed prior to the institution of the proceeding for eviction. The appellate authority also found that the landlady did not have sufficient means to demolish the building now in existence and construct another building thereon. He therefore, allowed the appeals and dismissed the petitions for eviction. Against this order of the learned appellate authority, these six civil revision petitions have been preferred.

2. Admittedly, the building which is now in the occupation of the tenants is not less than 50 years old and the front portion of the building has, already, fallen into ruins and is in a dilapidated condition. The building constitutes a hazard to the occupants themselves. Therefore there can be no doubt about the fact that the building does require to be demolished. In *N.A. Ramanatha Iyer and others* v. *Bathul Bai and others*[1] Ramanujam J., has held that :

> "It cannot be said that in all cases whenever an application for demolition and reconstruction is made, a prior sanction of the Municipality should have been obtained. Madras Act XVIII of 1960 nowhere provides that a petition for demolition and reconstruction should be made only after getting the required sanction from the Municipality. The respondents have already applied for the sanction from the Municipality and that shows that they have taken all preliminary steps for the purpose of demolition and reconstruction and, that is sufficient to show their *bonafides*".

With this view of the learned Judge, with great respect, I entirely agree. Having regard to the time taken for the disposal of such petitions and the attempts of the tenants to protract the proceedings it is not surprising that the landlady did not want to obtain a licence for constructing the building before filing the petition for eviction because the period provided for constructing the building in such licence would expire before the petitions are disposed of. The mere fact that the application for grant of a licence was filed subsequently, does not discredit the case of the landlady that she *bona fide* requires the building for demolition if there are other facts which lend support to her case. In the instant case, the mere fact that the building is so old as to require demolition is sufficient to lend credence to the case of the landlady.

3. It is seen from the evidence of P.W. 1 that she is subscribing to a chit at the

1. (1971) 2 M.L.J. 383.

monthly rate of Rs. 1,000 and that she is also getting a monthly income of Rs. 400. It is seen from Exhibit P-14 that the landlady is subscribing to a chit of the value of Rs. 10,000. She has sold a house for Rs. 41,000 and has discharged her debts. In the course of the examination in chief it has been suggested to her and she has denied the suggestion that it is not true to say that she has a cash of Rs. 20,000 on hand. The learned appellate authority was unwilling to believe the case of the landlady because an estimate of the cost of the building proposed to be constructed has not been worked out and filed as an exhibit in this case. The building now in the occupation of the tenants appears to be a *kachcha* building. The building which the landlady proposes to put up in its place, also, is not likely to be a building of such a nature as to require a cost estimate being made in advance. It has been proved by P.W. 1 that her husband is earning about Rs. 1,000 per month. The learned Rent Controller had found that she has sufficient means to demolish the building now in existence and put up a new construction on the site of the same. The reasons given by the learned appellate authority for differing from this view of the learned Rent Controller are not satisfactory. The landlady has come forward with a case that she proposes to demolish and destroy her own property. As observed by Ramaprasada Rao, J., in *Chandra Valli* v. *Sha Poonamchand*[1], that would not be a case which is automatically illustrative of the *mala fides* of the landlady.

4. *Bona fides* is a question of degrees. *Bona fides* have to be assessed with reference to the circumstances and facts of each particular case and in the context and framework of the situation prevailing at that time. The situation here is that the building does require to be demolished on account of its dilapidated condition. The landlady is bound to give an undertaking that the work of demolishing any material portion of the building shall be substantially commenced by her not later than one month and shall be completed before the expiry of three months from the date she recovers possession of the entire building or before the expiry of such further period as the Controller may fix by reason of section 14 (2) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act. If she fails to do so, the tenants can seek recovery under section 16 of the aforesaid Act.

5. It is further contended by the learned counsel for the respondents that after the proceedings were initiated, a new tenant was inducted into a part of the building and he has been examined as a witness by the landlady herself on her side. The learned counsel for the civil revision petitioner now states, and the learned counsel for the respondents concedes, that this tenant inducted subsequently has now vacated the part of the building which was in his possession. In the circumstances, I am of the opinion that the landlady is entitled to evict the tenants for the purpose of demolition and reconstruction. Therefore, the orders of the learned appellate authority in all these appeals against which the civil revision petitions have been filed are set aside and the orders of the learned Rent Controller for eviction are restored. The landlady shall give an undertaking that the work of demolishing a material portion of the building shall be substantially commenced by her not later than one month and shall be completed by her before the expiry of three months from the date, she recovers possession of the entire building. Time for eviction six months. Hence all these civil revision petitions are allowed. No order as to costs.

R.S. ——— *Petition allowed.*

1. (1975) T.L.N.J. 266 and 267.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

The Ramanathapuram Market Committee, Virudhunagar, through its: 1. Secretary S. Seshachalam and 2. Chairman S. Jayarama Reddy ..*Appellants**

v.

East India Corporation Ltd., Madurai, through its Managing Director, T. S. Sundaram Chettiar ..*Respondent.*

(A) *Madras Commercial Crops Markets Act (XX of 1933)—Constitution of Market Committee under the Act.*

(B) *Madras Agricultural Produce Markets Act (XXIII of 1959)—Act came into force on 22nd October, 1962—Repeal of old Act—Levy and collection of cess by Market Committee by mistake for a period from 22nd October; 1962 till 26th May, 1964—Suit for recovery of sum paid under mistake—Period of limitation—"Reasonable"—Meaning of.*

(C) *Limitation Act (IX of 1908), Articles 95 and 96.*

(D) *Limitation Act (XXXVI of 1963), Article 24 and Section 17.*

The provisions of the Limitation Act should be interpreted strictly in accordance with the language used, but it is always necessary that a litigant, who relies upon it, should bring his cause within the four corners of the terms of the statute. An attempt to deprive the party entitled to a right arising out of an existing benefit should not lightly be made by Courts. But such a pleading as to bar of the cause of action should flow from a permissible construction of the statutory provision. [*Para.* 10.]

Article 95 of the Limitation Act of 1908 dealt with a cause grounded on fraud. Article 96 dealt with reliefs on the ground of mistake. In the former Article a period of three years was provided from the time when the fraud becomes known to the party wronged. Similarly, a period of three years was provided in cases where relief on the ground of mistake is asked from the time when the mistake becomes known to the plaintiff. In the Act of 1963, the appropriate Article which could, if at all, be attracted in the instant case is Article 24. But this has to be read in conjunction with Section 17 of the Limitation Act. [*Para.* 13.]

In the old Act, stress is laid on the knowledge of the person, who wants to take advantage of the enlarged period of limitation. In the new Act, emphasis is on the date when the plaintiff has discovered the fraud or mistake or could, with reasonable diligence, have discovered it. By the use of the phrase "with reasonable diligence", in Section 17 of the Act, the Legislature has given scope for the defendant to contend that the date of knowledge or discovery pleaded is not the sure date of such discovery of mistake or fraud. The plaintiff is therefore not mechanically permitted to adduce a plea over the matter in issue as a step in aid to maintain the action. Where legality of some proceedings is the matter in dispute between the two parties, he who maintains its legality and seeks to take advantage of it, cannot rely upon the proceedings as a bar to the adverse party. If the plaintiff's allegation ao to the date of the knowledge of the mistake is adopted and accepted as a matter of course, then he would automatically be licensed to prejudice his adversary. *A fortiori* in a case where the defendant challenges the allegation it is for the plaintiff to establish that he could not have discovered the mistake "with reasonable diligence" on a date earlier than that on which the plaintiff bases his cause of action. [*Para.* 15.]

Cases referred to:—

Sales Tax Officer, Banaras and others v. *Mukundalal Saraf*, 1959 S.C.R. 1355: 1959 S.C.J. 53: A.I.R. 1959 S.C. 135; *Sri Kishan* v. *Chana Anand*, A.I.R. 1929 All. 721 ; *Martand* v. *Radha Bai* A.I.R. 1931 Bom. 97; *Sardar Gurbaksh* v. *Gurdial Singh*, A.I.R. 1927 P.C. 230.

* Appeal No. 188 of 1970. 24th *January*, 1975.

Appeal against the decree of the Court of the Subordinate Judge, Ramanathapuram at Madurai in Original Suit No. 90 of 1968.

P. Jayaraman, for Appellant.

K.K. Venugopal and *P.L. Meyappan*, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The Ramanathapuram Market Committee, Virudhunagar, constituted or established by the Government of Tamil Nadu under section 5 of the Madras Agricultural Produce Markets Act (XXIII of 1959) who is the defendant in O S. No. 90 of 1968, on the file of the Subordinate Judge of Ramanathapuram at Madurai is the appellant. The Tamil Nadu Act XXIII of 1959 came into force on 22nd October, 1962. But by a notification in the Fort. St. George Gazette on 18th April, 1962 pursuant to the G.O.Ms. No. 1054 (Food and Agriculture) dated 30th March, 1962 the State Government directed the constitution of a market committee at Virudhunagar and markets at Virudhunagar, Rajapalayam and Sattur in Ramanathapuram District. These committees were no doubt regularly constituted and established under the provisions of the Madras Commercial Crops Markets Act (XX of 1933). The main intendment of the Act is to provide for the better regulation of buying and selling of commercial produce in the State of Tamil Nadu and in order to achieve that object, a machinery is set up to control the trade in commercial crops and impose restrictions on the carrying of such trade. Cotton is one of the commercial crops, which comes within the purview of Act XX of 1933. Under the provisions of the Act, the State Government is entitled to exercise control over the purchase and sale of commercial crops including cotton, and declared certain areas to be specified areas within which such control could be exercised by the State. In order to achieve the said purpose market committee are established by the State Government for every notified area. Once a market committee is set up, and a notified area is notified, then the sale and purchase of commercial crops could be carried on only in such places as are notified and in accordance with the conditions of a licence issued by the appropriate authority. One of the provisions of the Act authorises the market committee to levy such fee on the notified commercial crop bought or sold in the notified area at such rates as it might prescribe. Act XX of 1933 was repealed and practically re-enacted though with slight modification under the caption of the Madras Agricultural Produce Markets Act (XXIII of 1959). This Act came into force on 22nd October, 1962. There are provisions, which are very similar to the provisions of Act XX of 1933, to which we have already made a reference. Under this Act also a market committee is established and an area is notified on the notified market area for the sale and purchase of agricultural produce and the market committee is enabled to impose a cess by way of sales tax on any notified agricultural produce bought or sold in the notified market area at the prescribed rate. A saving provision is made under section 38, which enabled the continuance of the notified area and the market committee under the provisions of Act XXIII of 1959. What happened was that prior to the date when Act XXIII of 1959 came into force, the State Government declared and published several notifications amongst which the notification published pursuant to G.O. Ms. No. 1054 dated 30th March, 1962 is relevant. Under this, Virudhunagar, Rajapalayam and Sattur were notified as market areas under the latter Act. Realising the mistake, a notification under G.O.Ms. No. 1052 Food and Agriculture, dated 30th March, 1964 was made and published in the Gazette on 27th May, 1964 cancelling the 1962 notification and on the same date, a re-declaration, was made declaring certain areas in Virudhunagar, Rajapalayam and Sattur as notified market areas in respect of cotton, groundnut and chilies. In the present litigation, the cess collected for a period prior to 22nd October, 1962 is not in dispute, as obviously the said collection was made under Act XX of 1933 and even otherwise such collections were validated by the passing of the Madras Commercial Crops Markets (Validation of Cess) Act (VII of 1963).

2. The bone of contention between the parties, however, is that all such levy and collection of cess by the defendant as a market committee under Act XXIII of 1959 for a period commencing from 22nd October, 1962 till 26th May, 1964 is illegal and that they have paid the cess under a mistake of law or of fact.

3. The plaintiff is a limited concern carrying on business in the purchase and sale of cotton. It has its Head Office at Madurai with branch offices in towns like Virudhunagar, Rajapalayam, and Sattur. The complaint is that the defendant as a market committee, did not have the jurisdiction to levy and collect cess under the Madras Agricultural Produce Markets Act, 1959 (XXIII of 1959) prior to the date when it came into force and that, therefore, the collection of the cess made during the period commencing from 22nd October, 1962 to 27th May, 1964 is invalid and that all such amounts which were paid under a mistake, is recoverables by the plaintiff. The plaintiff's case is that it was during the third week of September, 1965, it came to know about the unauthorised nature of the levy collected from it from 22nd October, 1962. In that situation, it laid the present suit on 28th August, 1968 for the recovery of a sum of Rs. 19,731.32 made up of Rs. 2,982.92 collected by the defendant as cess from its Virudhunagar branch, Rs. 8,383.50 from its Rajapalayam branch, and Rs. 8,364.90 from its Sattur branch. The defendant's case is that the levy was authorised and that the defendant in exercise of its statutory functions, imposed the levy and collected the fee and that it cannot be challenged or declared to be unauthorised. The defendant also expressly pleaded that the suit is barred by reason of Article 78 of the Indian Limitation Act. The other contention is that as the plaintiff did not exhaust the special remedies provided under the Act for setting aside the levy, the civil court cannot adjudicate on it and in that sense the suit is not maintainable. On these relevant pleadings, the following issues were framed :

1. Whether levy and collection of cess made from 18th April, 1962 to 27th May, 1964, from the plaintiff at Virudhunagar, Rajapalayam and Sattur by the defendant market committee are illegal and unauthorised?

2. Whether the said levy and collections made by the defendant market committee cannot be challenged as illegal or unauthorised or ineffective for any of the reasons stated in the written statement?

3. Whether the suit filed without impleading the State Government as a party is not maintainable?

4. Whether the plaintiff is estopped from claiming the refund of the amounts collected?

5. Whether the suit is out of time under Article 72 of the Limitation Act ?

6. What is the correct amount to which the plaintiff is entitled to get by way of refund?

7. To what relief is the plaintiff entitled?

4. The learned Judge came to the conclusion that the levy and collection of cess made by the defendant from the plaintiff for a period 22nd October, 1962 till 26th May, 1964 is illegal and unauthorised, and found the issue in favour of the plaintiff. On issues 2 and 4, he found against the defendant and held on issue 3 that the State Government was not a necessary or proper party to the suit. On the main issue, which has been argued in full before us, he found that the suit having been filed on 28th August, 1968 was within time and that the mistake in the matter of the payment of the cess, though voluntary, could have been discovered by the plaintiff only on 20th September, 1965 and that, therefore, the suit was in time. In the result, he decreed the suit as prayed for. It is as against this, the present appeal has been filed.

5. It is unnecessary for us to go into the gamut of the case law regarding the validity of the levy.

6. We are not called upon in this case to consider whether the levy of the cess by the market committee is legal, as the finding of the Court below that it was not so, has not been seriously challenged before us. Even otherwise, in the view that we intend taking on the issue on limitation, it is not necessary even for us

to consider the hesitant argument addressed by the learned counsel for the appellants.

7. The material point, however, is whether the suit claim is barred by limitation. We have already referred to the fact that the plaintiff's case is that it paid the cess for the period commencing from 22nd October, 1962 to 27th May, 1964, under a mistake of law as well as fact. The plaint, to recover such amounts paid by the plaintiff under mistake, was filed on 28th August, 1968. Considerable reliance is placed on Exhibit A-1, which is a letter written by the Ramanathapuram Market Committee, Virudhunagar, to East India Corporation Ltd., Virudhunagar. It runs as follows:

> "In the notification, the previous order was cancelled and a new order was published. Nothing is said about the cess, whether the amount collected is to be refunded or collection is to be continued. For conducting normal work, the committee resolved to collect cess from 27th May, 1964."

The argument is that the plaintiff's knowledge as to its quondam mistake in the matter of the payment of the cess during the relevant period should be taken to be the date of the above letter, when the Market Committee informed them that nothing is known about the cess already collected and whether the amount collected is to be refunded or collection is to be continued.

8. Mr. K.K. Venugopal, learned counsel for the respondent streneously contends that it is this letter which has given the cause of action for the plaintiff to file the action and as the suit has been laid within three years from the date of Exhibit A-1, the claim is in time.

9. Mr. Parasaran, learned counsel for the appellants, however, would say that even on a reading of the letter, it is clear that the plaintiff was making enquiries regarding the refund of cess and such enquiry was possible only when the plaintiff definitely entertained a doubt about the validity of the payments it made earlier during the suit period. The parties did not produce any earlier letter so as to bring home the date of discovery of its knowledge as to such mistaken payments. Mr. Parasaran, therefore, rightly contends that the date in Exhibit A-1 by itself cannot be the date, when such a discovery as to the mistake committed was found and that it was long prior to that date and if it was prior to 21st September, 1965 then the presumption is that the plaintiff ought to have known about such mistaken payment, when the fresh notification was issued cancelling the earlier notification. If this date is taken as the date when the plaintiff could have reasonably discovered the mistake on its part, then the suit is barred by limitation.

10. The law as to limitation affords a guarantee to the litigant public that after the lapse of a particular priod of time prescribed under the Act, the cause of action rests. The object of the statute of limitation is preventive and not creative. It interposes a statutory bar after a certain period and gives a quietus to suits to enforce an existing right. Such extinguishment of claims by statutory interference resulting in making certain demands stale should be construed strictly. No doubt the provisions of the Limitation Act should be interpreted strictly in accordance with the language used, but it is always necessary that a litigant, who relies upon it, should bring his cause within the four corners of the terms of the statute. An attempt to deprive the party entitled to a right arising out of the existing benefit should not lightly be made by Courts. But such a pleading as to the bar of the cause of action should flow from a permissible construction of the statutory provision.

11. We shall now refer to the pleadings to find as to how the plaintiff, who has come to Court, could plead that its cause is in time. According to the plaintiff, during the third week of September, 1965 it came to know about the unauthorised and illegal levy and collection of the cess by way of sales-tax from 18th April, 1962 and thereupon it made enquiries and that the Ramanathapuram Market Committee, Virudhunagar, under Exhibit A-1 held out that the previous notification was cancelled and a new order was published. The plaintiff desires to infer that it is only from Exhibit A-1 the plaintiff came to know about the publication of a new order and that that date which Exhibit A-1 bears, ought to be the date when the plaintiff dis-

covered the mistake. In the cause of action paragraph, the plaintiff states that the cause of action for the suit arose when the illegal collections have been made during the period 22nd October, 1962 to 26th May, 1964 and on 20th September, 1965 when the mistake of collection and the payment was made known to the plaintiff by the defendant under Exhibit A-1. The defendants expressly plead that when a fresh notification dated 27th May, 1964 was made cancelling the earlier notification dated 18th April, 1962, that is the basis of the plaintiff's claim and it was futile for the plaintiff to state that he came to know of the unauthorised and illegal levy only during the third week of September, 1965. The appellants add that such a statement has been made only to escape the fact that the claim is out of time. They also referred to the fact that traders similarly placed like the plaintiff challenged Tamil Nadu Act XX of 1933 and Tamil Nadu Act XXXIII of 1959 and it is, therefore, futile for the plaintiff to say that it could discover the illegality of the levy only during the middle of September, 1965. The defendants add that the suit is out of time under Article 72 of the Limitation Act.

12. It is interesting to note that the plaintiff did not even examine any witness on its side to pin-point the reasonable date when they had knowledge about the mistaken payment. On the other hand, the defendants examined two witnesses. The plaintiff's counsel in cross-examination specifically invited the attention of D.W. 1 to Exhibit A-1. There was not even a suggestion in the cross-examination to this witness that the plaintiff began to enquire about the mistaken payments only in the third week of September, 1965. It is in this nebulous state of affairs the issue as to limitation has to be looked into. The learned Trial Judge heard arguments of counsel, one relying upon Article 59 of the Limitation Act and other upon Article 72 of the Act. The learned Judge brushed aside the argument of the learned counsel for the plaintiff that Article 59 could be invoked in the instant case. He also rejected the argument of the counsel for the defendants, who invoked Article 72 of the Act. The learned Judge for himself investigated into the matter and was of the view that Article 24 read with section 17 of the Limitation Act of 1963 would apply. He concluded by saying that the plaintiff has proved that under a mistake of law, the suit amount was paid and, therefore, the onus of proof is on the defendants to establish that the plaintiff had either discovered or could have discovered with reasonable diligence the mistake at a time beyond the period of limitation. He solely relied upon the pleading in the plaint wherein the plaintiff alleged that it came to know of the mistaken payment and the unauthorised levy only on 20th September, 1965 and reading it in the light of Exhibit A-1 found that there was no other document in the case to indicate that the plaintiff could have discovered the mistake prior to 20th September, 1965. He held, therefore, that the suit was within time.

13. The earlier law on the aspect under consideration was covered by two Articles under the Limitation Act, 1908. Article 95 dealt with a cause grounded on fraud. Article 96 dealt with the reliefs on the ground of mistake. In the former Article a period of three years was provided to seek for a relief on the ground of fraud from the time when the fraud becomes known to the party wronged. Similarly, a period of three years was provided in cases wherein a relief on the ground of mistake is asked from the time when the mistake becomes known to the plaintiff. In the new Act, the appropriate Article, which could, if at all, be attracted is Article 24, which runs as follows :

	Description of suit.	*Period of Limitation*	*Time from which period begins to run.*
"24.	For money payable by the defendant to the plaintiff for money received by the defendant, for the plaintiff's use.	Three years.	Whne the money is received.

But this has to be read in conjunction with section 17 of the Limitation Act.

14. Section 17 of the Limitation Act deals with the effect of fraud or mistake in a particular suit or application for which a period of limitation is prescribed by the Act. Section 17 says that where the suit or application is for relief from the consequence of a mistake, the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it. We are not referring to the other limbs of section 17, as they are not absolutely necessary for purposes of the present litigation.

15. The difference in the context and the language adopted by the old and the new Acts is rather significant. In the old Act, stress is laid on the knowledge of the person, who wants to take advantage of the enlarged period of limitation. In the new Act, emphasis is on the date when the plaintiff has discovered the fraud or mistake or could, with reasonable diligence, have discovered it. By the use of the phrase "with reasonable diligence" in section 17 of the Act, the Legislature has given scope to the defendant to contend that the date of knowledge or discovery pleaded is not the sure date of such discovery of mistake or fraud. It is open to the defendant to establish that "with reasonable diligence", the plaintiff could have discovered the fraud or the mistake earlier. The plaintiff, therefore, is not mechanically permitted to adduce a plea over the matter in issue as a step in aid to maintain the action. Where the legality of some proceeding is the matter in dispute between the two parties, he, who maintains its legality and seeks to take advantage of it, cannot rely upon the proceeding itself as a bar to the adverse party. To do so, would involve the logical fallacy of *petitio principi* and would in many cases preclude redress to the aggrieved party. If the plaintiff's allegation as to the date of the knowledge of mistake is adopted and accepted as a matter of course, then he would automatically be licensed to prejudice his adversary. *A fortiori* in a case where the defendant challenges the allegation, it is for the plaintiff to establish that he could not have discovered the mistake "with reasonable diligence" on a date earlier than that on which the plaintiff bases his cause of action. As is said, it would be unreasonable to expect an exact definition of the word "reasonable". Reason varies according to times and circumstances in which the individual thinks. Thus, the word "reasonable" has always been understood in law as *prima facie* meaning, reasonably in regard to those circumstances of which the actor called on to act reasonably, knows or ought to know. It is also a fundamental maxim, "of things relating to each other, one being known, the other is also known". In the instant case, when the plaintiff knew about the cancellation of the earlier notification by a later notification then it is normally and reasonably expected that it knew or with reasonable diligence ought to have discovered that the payments made by it under the earlier cancelled notification were irregular and improper and the payments were made under a mistake of law or of fact. The cancellation of the earlier order is intimately connected with the mistake in the payments made by the

plaintiff pursuant to the first withdrawn order. As it knew or ought to have known and with reasonable diligence should have discovered that the earlier notification has become inoperative by its cancellation under the second notification, then that being known, then the other, namely, that it should seek for the refund of the said amounts on such discovery within the prescribed period of limitation, could have been known also. Such a discovery is possible because of the impact of one event as against the other.

16. The plaintiff in this case does not deny the knowledge of cancellation of the earlier order. He knew that G.O. Ms. No. 1054, dated 30th March, 1962 was cancelled by G.O. Ms. No. 1052, dated 30th March, 1964. The later was published in the gazette on 27th May, 1964. The payments, which are claimed to have been made under a mistake whether of facts or of law, were during the period commencing from 22nd October, 1962 till 26th May, 1964. By the publication of the second notification on 27th May, 1964 the plaintiff with reasonable diligence could have discovered the mistake committed by it. It ought to have, therefore, filed the suit for refund of the amounts paid as a consequence of such a mistake within three years from the date when the second notification became effective, that is, the suit ought to have been filed within three years from 27th May, 1964. The plaintiff does not deny the knowledge of the cancellation of the earlier order, nor the publication of the second order cancelling the former. The impact of such knowledge leads to the reasonable inference that the discovery of the mistake in the payment of the cess was contemporaneous with the publication of the second notification. Having regard to the circumstances in which the plaintiff was called upon to act in law, it knew or ought to have known about the mistake in the payments made by it and it ought to have, therefore, been diligent in instituting the action within three years from the date of the second notification.

17. The decision quoted by Mr. Venugopal in *Gunabai* v. *Motilal*,[1] has no application. The learned Judge was dealing with a case under the old Limitation Act where the accent was on knowledge. In that case, the plaintiff specifically alleged that it was only at a certain time, he had knowledge of facts, which would entitle him to have the instrument cancelled or set aside. In those circumstances, the learned Judge held that it is incumbent on the person who pleads that the suit is barred by time, to allege and prove a knowledge prior to the period from which time begins to run. On the facts, the learned Judge held that the defendant did not discharge his burden. In our case, the specific allegation of the defendants-appellants is that the plaintiff, by reason of the second notification, should be presumed to have discovered the mistake in the earlier payments on that very date. This contention is not an unreasonable contention; for it is always necessary for Courts to be satisfied with the reasonableness within reach. It cannot be said that the contention of the appellants that on the date when the second notification became effective, the plaintiff should be deemed to have discovered the mistake, is an unreasonable contention or conclusion.

18. We have already seen Exhibit A-1. The plaintiff was making enquiries and it was only pursuant to such enquiries that the defendant wrote Exhibit A-1 in reply. It cannot, therefore, be said that Exhibit A-1 gave any cause of action at all to the plaintiff. On the other hand, it would be fair to assume that the enquiries which the plaintiff was making prior to the date when Exhibit A-1 was written by the defendants, was in relation to the refund of the cess paid by it under a mistake. The plaintiff avoids the box. It does not even explain as to what was the nature of the enquiries made. It is no doubt well established that the word "mistake" appearing in section 72 of the Indian Contract Act takes into its fold mistake of fact as well as law and would entitle a litigant to recover even a tax, if it is established that such a payment has been made by the party labouring under a mistake of law. (See *Sales-tax Officer, Benaras and others* v. *Mukundlal Saraf*[1]. When the plaintiff alleged a mistake in this case and particularly stated that it discovered such a mistake on a particular

1. A.I.R. 1925 Nag. 398.

1. 1959 S.C.J. 53: 1959 S.C.R. 1350: A.I.R. 1959 S.C. 135.

date, the initial burden would be on it to lead evidence, *prima facie* at any rate to establish the date of discovery of such a mistake. It is only in extraordinary cases where the plaintiffs are emphatic and the defendants avoid answering a specific claim as to the date of discovery or knowledge, the Courts in their discretion might dispense with the further proof of the date of acquisition of such knowledge or date of discovery. See *Sri Kishan* v. *Ghananand*[1]. We have already referred to the fact that the plaintiff has avoided the box. The Bombay High Court in *Martand* v. *Radhabai*[2], relying upon *Sapdar Gurbaksh* v. *Gurdial Singh*[3], observed thus :

> "It is the bounden duty of a party personally knowing the facts and circumstances, to give evidence on his own behalf and to submit to cross-examination and his on-appearance as a witness would be the strongest possible circumstance which will go to discredit the truth of his case."

After giving our anxious consideration to this subject, we are of the view that the suit is out of time, since the plaintiff should be deemed to have with reasonable diligence, discovered the mistake as to the mistaken payments on the date when the second notification was made and the suit having been filed beyond three years from the said date, it is barred under Article 24 of the Limitation Act. The learned Judge went wrong in having applied a wrong principle and ultimately decreeing the suit.

19. The result is that the appeal is allowed, but in the peculiar circumstances, there will be no order as to costs.

R.S. *Appeal allowed.*

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1. A.I.R. 1959 All. 721.
2. A.I.R. 1931 Bom. 97.
3. A.I.R. 1927 P.C. 230.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*S. Maharajan, J.*

Goodman and Company, by its Proprietor R. C. Mallikeswaran, having its Office No. 31, Jawaharlal Nehru Street, Pondicherry .. *Petitioner**

v.

R. S. Thirunavukarasu .. *Respondent.*

Limitation Act (XXXVI of 1963), Articles 14, 68—Pondicherry—Suit for recovery of possession—Sale of a radio set—Sale price not paid—Suit for recovery instituted after 3 years—Whether Limitation Act applies or local law applies.

A suit was filed in Pondicherry for the recovery of possession of a radio set from the defendant or in the alternative, for the recovery of Rs. 450 being the value thereof. The radio set was sold in July, 1965 but the suit was filed only on 23rd February, 1971. The trial Court relying on Articles 14 and 68 of the Limitation Act, 1963, held that the suit was barred by limitation. The plaintiff preferred a revision.

Held: The saving provision of the Limitation Act, 1963 makes it clear that all French enactments relating to limitation, which were in force in the Union Territory of Pondicherry at the time the Limitation Act, 1963 came into force shall continue to be in force, with this difference, namely that the periods of limitation prescribed in the local law must continue to apply as if such periods were the periods prescribed by the schedule to the Indian Limitation Act, 1963 and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply on condition that those provisions are not expressly excluded by such special or local law as has been in force in the Union Territory of Pondicherry. [*Para.* 5.]

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* C.R.P. No. 623 of 1972 (P). 11*th March*, 1976.

The last paragraph of Article-2272 of the Code Civil says that actions filed by a merchant for goods sold by them particularly to non-merchants shall be extinguished by the lapse of two years. The suit having been filed on 23rd February, 1971 is clearly barred by the local law of limitation. [*Para* 6]

Case referred to:—

Municipal Council, Palai v. *T. J. Joseph*, (1964) 2 S.C.R. 87 : (1964) 2 S.C.J. 759 : A.I.R. 1963 S.C. 1561.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the Decree of the Court of the Principal District Munsif, Pondicherry dated 11th January, 1972 and passed in S.C. No. 54 of 1971.

J. Stanislas, for Petitioner.

Government Pleader, for Pondicherry.

K. Parasaran, for Union of India.

The Court delivered the following

JUDGMENT.—The plaintiff, Goodman and Company, by its proprietor Mallikeswaran has filed this revision petition against the judgment of the Principal District Munsif, Pondicherry, dismissing the plaintiff's suit against Thirunavukarasu, the respondent herein, with costs.

2. The suit itself was filed for recovery of possession of a radio set from the defendant, or in the alternative, for recovery of Rs. 450 being the value thereof. The case of the plaintiff was that in the month of July, 1965, the defendant came to the plaintiff's company for the purchase of a radio set. The plaintiff was willing to sell the plaint schedule radio set to the defendant, but the defendant said he would observe the functioning of the radio set for 2 or 3 days and if he was satisfied with the quality of the set, he would pay for the same. But the defendant neither paid the money nor returned the radio set. The suit itself was filed on 23rd February, 1971. The defendant denied the plaint allegation and said that the radio had been gifted to him in 1965 for the services rendered by him to the plaintiff's company. He also contended that the plaintiff's claim was barred by limitation.

3. The Court below, relying upon Articles 14 and 68 of the Indian Limitation Act of 1963, held that the suit not having been filed within three years, was barred by time.

4. It is against this judgment, the plaintiff has preferred this revision petition. As some important questions of law are involved in this case, I directed notice to issue to the Government Pleader, Pondicherry as well as to the Standing Counsel for the Central Government, Mr. K. Parasaran.

5. Mr. Parasaran appeared and argued the questions of law with his usual thoroughness. The main question that arises for consideration is whether the period of limitation prescribed by the Limitation Act, 1963, applies to the facts of this case, or that prescribed by the Code Civil. The suit dealing took place in July, 1965. The *de jure* merger of the erstwhile French Indian territory took place on 16th August, 1962. Under section 4 of the Pondicherry (Administration) Act, 1962 which came into force on 6th December, 1962, it was provided as follows:

> "(1) All laws in force immediately before the appointed day in the former French Establishments or any part thereof shall continue to be in force in Pondicherry until amended or repealed by a competent Legislature or other competent authority.
>
> ('Appointed day' has been defined in section 2 (*b*) of the Act to mean the 16th day of August, 1962, being the date of entry into force of the Treaty of Cession between India and France.)"

There is a proviso to clause (1) of section 4 which says that references in any such law to the President or Government of the French Republic shall be construed as references to the Central Government, references to the Governor of the French Establishments in India, to the Commissioner of the Republic for the French Establishments in India, to the Chief Commissioner for the French Establish-

ments, to the Chief Commissioner of the State of Pondicherry or to the Chief Commissioner, Pondicherry," shall be construed as references to the Administrator of Pondicherry and references to the State of Pondicherry shall be construed as references to Pondicherry. Clause (2) of section 4 of the Pondicherry (Administration) Act prescribes that for the purpose of facilitating the application of any such law in relation to the administration of Pondicherry and for the purpose of bringing the provisions of any such law into accord with the provisions of the Constitution, the Central Government may, within three years from the appointed day, by order, make such adaptations and modifications, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon every such law shall have effect subject to the adaptations and modifications so made. By the Fourteenth Amendment to the Constitution, which came into force on 28th December, 1962, in the First Schedule to the Constitution under the heading "II. THE UNION TERRITORIES", after entry 8, the following entry was inserted, namely:—

> 9. Pondicherry: The territories which immediately before the sixteenth day of August, '62, were comprised in the French Establishments in India known as Pondicherry, Karaikal, Mahe and Yanam.".

The Government of Union Territories Act, 1963 was passed by Parliament and it received the assent of the President on the 10th May of 1963, whereby provision was made for legislative Assemblies and Ministers for the Union Territories including the Union Territory of Pondicherry. It is important to remember that when the Limitation Act, 1963, was passed by Parliament on 5th October, 1963, the Union Territory of Pondicherry had already become part of India. Clause (2) of section 1 of the Limitation Act, 1963, says that it extends to the whole of India except the State of Jammu and Kashmir. It would, therefore, follow that the Union Territory of Pondicherry having become part of India, the Limitation Act automatically extended to Pondicherry. No doubt, under clause (3) of section 1 of the Limitation Act, it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint. By S.O. 3118 of the Ministry of Law, Legislative Department, dated 29th October, 1963, the Central Government appointed the 1st day of January, 1964, as the date on which the said Act shall come into force. It may, therefore, be taken that the Limitation Act, 1963, came into force in the Union Territory of Pondicherry on the 1st day of January, 1964. It is necessary now to find out if, by virtue of the provision of the Limitation Act, 1963, the French Law of Limitation, which had been in force till the 1st day of January, 1964, was in any manner repealed or modified. Reference may be made in this connection to section 29 of the Indian Limitation Act, 1963 clause (2) of which says:

> "Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which they are not expressly excluded by such special or local law."

As reference is made in clause (2) of section 29 to section 3 of the Limitation Act, it is necessary to abstract clause (1) of that section, which alone is relevant for the present purpose and which runs as follows:—

> "(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence."

Clause (2) of section 3 defines when a suit should be deemed to have been insti-

tuted and when a claim by way of set-off or a counter claim shall be treated as a separate suit and shall be deemed to have been instituted. The cumulative effect of section 3 and section 29 (2) of the Limitation Act is that where any special or local law prescribed for a proceeding a period of limitation different from that prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the schedule, and for the purpose of determining the period of limitation prescribed for any proceeding by any special or local law, the provisions contained in sections 4 to 24 shall apply to the extent to which they are not expressly excluded by such special or local law. Mr. Parasaran, learned counsel for the Central Government concedes that the periods of limitation prescribed by the French Code Civil have in no manner been repealed by the Indian Limitation Act, though, no doubt, persons governed by the Code Civil will get the additional benefit of the provisions of sections 4 to 24 of the Limitation Act to the extent to which those provisions are not expressly excluded by the Code Civil or special or local law. In support of this concession he points out that all that section 32 of the Indian Limitation Act seeks to repeal is the Indian Limitation Act, 1908, and no other law. In further support of this concession, he refers to section 30 of the Limitation Act, 1963, which takes the precaution of providing that any suit for which the period of limitation under the Limitation Act, 1963, is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, may be instituted within a period of five years next after the commencement of the 1963 Act or within a period prescribed for such suit by the Indian Limitation Act, 1908, whichever period expires earlier. It is further conceded by him that the French Code Civil is a local law or a special law within the meaning of section 29 of the Limitation Act, 1963. In support of this view, reference is made by him to Halsbury's Laws of England, Third Edition, Volume 36, page 363 paragraph 533, which deals with "General, local and personal statutes" and adds:

> "The classification of statutes into general, local and personal is a classification based on the extent of their operation. A statute is said to be general if it applies to the whole community, local if it is limited in respect of area, personal if it is limited in respect of individuals.
>
> Examples of local statutes are those conferring on particular local authorities powers not enjoyed by local authorities generally; those establishing particular bodies for the performance of purely local functions; those authorising the carrying out of particular works by bodies, for example authorities carrying on nationalised undertakings or commercial concerns, whose overall functions may not be of a purely local nature; and those relating to particular charitable and educational foundations and institutions."

In *Municipal Council, Palai* v. *T. J. Joseph*[1], the Supreme Court has observed as follows:

> "A general statute applies to all persons and localities within its jurisdiction and scope as distinguished from a special one which in its operation is confined to a particular locality and, therefore, where it is doubtful whether the special statute was intended to be repealed by the general statute the Court should try to give effect to both the enactments as far as possible."

The saving provisions of the Limitation Act, 1963, make it clear that all French enactments relating to limitation, which were in force in the Union Territory of Pondicherry, at the time the Limitation Act, 1963, came into force shall continue to be in force, with this difference, namely, that the periods of limitation prescribed in the local laws must continue to apply as if such periods were the periods prescribed by the Schedule to the Indian Limitation Act, 1963, and for the purpose of determining any period of limitation prescribed for any

1. (1964) 2 S.C.J. 759 : (1964) S.C.R. 87 at 99 : A.I.R. 1963 S.C. 1561.

suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply on condition that those provisions are not expressly excluded by such special or local law as has been in force in the Union Territory of Pondicherry.

6. This being the legal situation, I shall next proceed to consider which provision of the local law applies to the suit transaction. The plaintiff's claim in this case is one for the recovery of the price of a radio. The penultimate paragraph of Article 2272 of the Code Civil says that suits filed by physicians, surgeons, dentists, midwives and pharmacists for their visits, operations and medicaments shall become barred by efflux of two years. The last paragraph of Article 2272 says that action filed by merchants for goods sold by them particularly to non-merchants shall be extinguished by the lapse of two years. Mr. Stanislas, is fair enough to concede that this is the local law of limitation which would govern this action. It would then follow that the suit having been filed on 23rd February, 1971 that is to say, more than five years after the time of the disputed transaction (July 1965), it is clearly barred by the local law of limitation. In the Court below, reliance was placed by the petitioner upon Article 2262 of the Code Civil, which prescribes that all rights of action whether in *rem* or *in personam* are extinguished by prescription after thirty years and the person who sets up a title by prescription for thirty years is not obliged to rely on any title; nor can a plea alleging bad faith be set up. I fail to see how this general Article could apply to the plaintiff's action when the special Article 2272 is clearly applicable thereto. The Court below rejected the plaintiff's claim, not on the ground that Article 2262 is not applicable, but on the ground that Articles 14 and 68 of the Indian Limitation Act, 1963, would apply to the suit; and the suit having been filed more than three years after the transaction is barred under those Articles of the Indian Limitation Act. The reason given by the lower Court for holding that the plaintiff's claim is barred is clearly wrong, though its conclusion can be supported upon the reasoning adopted and the conclusions recorded by me. I, therefore, hold this petition fails, which will consequently stand dismissed. As the respondent is unrepresented I make no order as to costs. However, as counsel appeared on behalf of the Central Government as well as on behalf of the Union Territory of Pondicherry, I think it fair to fix counsel's fee at Rs. 250 each.

7. This petition having been posted on Friday the nineteenth day of March, 1976, for being mentioned before the Hon'ble Mr. Justice Suryamurthi, in the presence of the aforesaid advocates, the Court made the following

ORDER.—The counsel's fee appears to have been fixed for the purpose of enabling the respective counsel to collect their fee from the respective Government.

S.J. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

Pattusami Padayachi .. *Appellant**

v.

Mullaiammal and others .. *Respondents.*

(A) *Deed—Interpretation—Principles to be followed.*

(B) *Hindu Law—Joint family property in the name of female member—Whether joint family property—Burden of proof.*

The nomenclature or phraseology used by the parties ought not to be the sole guide to understand a document. The document has to be considered as a whole without taking one or the other of the sentences therein torn out of the context to find the intention of the parties. [*Para.* 13.]

*Appeal No. 436 of 1971. 17*th December*, 1975.

The properties purchased by one or other of the members of a coparcenary or joint family when the family is joint cannot as a matter of course be treated as joint family property. The coparcener who challenges such title in the member and pleads that they should also be brought to the hotch-pot ought to establish by cogent and mature evidence that there was enough surplus income which was available in the joint family and which positively could be the foundation for such annexures made by one or the other of the members of the joint family. In all cases definite proof is required that the further purchase in the names of joint family members ought to have been made and could not have been made otherwise than from the surplus income of the family. For a greater reason the rule is made strict in the case of properties in the name of female members. The fact that a female member in a joint family has properties in her own name would not necessarily lead to the conclusion that the origin of such properties should be traced to the joint family or to the income from the joint family, inasmuch as the stridhanam property of a female and possession of property by her have been recognised from ancient times. . . .

[*Para.* 18.]

Case referred to:—

Nagayasami Naidu v. *Kochadai Naidu'* (1970) 1 M.L.J. 105 : I.L.R. (1969) 1 Mad. 459 : 81 L.W. 436 : A.I.R. 1969 Mad. 329.

Appeal against the decree of the Court of the Subordinate Judge, Chidambaram in Original Suit No. 86 of 1967.

R. Gopalaswami Ayyangar and *M. Srinivasan*, for Appellant.

V. Ratnam, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The plaintiff in O.S. No. 86 of 1967 on the file of the Subordinate Judge of Chidambaram, is the appellant. Muthusami Padayachi is the common ancestor. He married twice and his senior wife is called Pattathammal and his second wife was known as Pattayee. Muthusami Padayachi originally belonged to Silambur in Trichi district. He had two sons through his first wife, who are the husband of the first defendant in the action and the 4th defendant herein. The plaintiff is the son through the junior wife. The senior wife died in or about 1940 and the junior wife in 1943. Though Muthusami Padayachi left a daughter through his first wife, she died leaving a minor daughter who also died in 1949. Muthusami Padayachi, therefore, left behind him surviving the first defendant's husband as the eldest son, the 4th defendant and the plaintiff as his second and third sons. Muthusami Padayachi originally belonged to Silambur and it is common ground that he divided his ancestral properties with his brothers and he secured considerable properties in the village of Silambur. After he married his first wife, who was a native of Tholuvur he shifted to the said village. The plaintiff's case is that though Muthusami Padayachi shifted to Tholuvur, he had considerable income from the joint family properties and with the assistance of such properties, he purchased various properties in the name of his senior wife at Tholuvur and those properties, though standing in the name of the senior or the first wife Pattathammal, should for all purposes be deemed to be the family properties and Pattathammal was only a benamidar. On the foot of the said allegations and also on the ground that Muthusami Padayachi died without effecting a partition, the plaintiff filed the action for declaration that he is entitled to one-third share in all the properties mentioned in the plaint schedules A to E and for a partition and separate possession and allotment of the shares of himself, the first defendant's branch and the 4th defendant's branch. According to the plaintiff, such properties are partible properties amongst the three branches referred to above. The plaintiff, of course, gave several details, regarding the manner and the method of purchase of various items of properties in the schedules by Muthusami Padayachi and claimed his share therein.

2. Defendants 1 to 3 filed a common written statement. According to them,

the ancestral properties acquired by Muthusami Padayachi in a partition between himself and his brothers were rain-fed lands of an extent of 18 acres and incapable of yielding any income. They would aver that the income was not even enough to maintain the family and consequently the suggestion of the plaintiff that Muthusami Padayachi purchased a further extent of 21 acres and built up a house in Tholuvur from the income of the Silambur lands is only a myth. They, therefore, deny that such of those properties which stood in the name of Pattathammal are not to be brought to the hotch-pot for division and that the plaintiff wrongly included those properties as partible properties. The defendants had claimed that Muthusami Padayachi's first wife, Pattathammal, belonged to a very rich and affluent family and the properties which stood in her name were all settled on her, or provided to her by her father and her ancestors and that Muthusami never contributed any money towards the purchase of the said properties. We are not setting out herein the various items of properties contained in the suit schedules which are referred to by the plaintiff as family properties, but by defendants as Pattayee Ammal's properties and which, according to them, are not partible amongst the sharers of the joint family of which Muthusami Padayachi was the ancestor. This is so because, no particular argument was addressed before us on any identifiable item of the schedules as having been purchased by Muthusami Padayachi at a particular point of time from and out of the income of the joint family or that he provided the necessary funds for their purchase, but got them in the name of the senior wife. The main defence is that prior to his death in the year 1962, Muthusami orally effected a partition of the joint family properties amongst his three sons and he has made a fair division of the properties in the family. It is claimed that the lands in Silambur village, which was the ancestral village, were allotted to the share of the 4th defendant who was also fostered by one of the brothers of Muthusami Padayachi, one Sepperumal Padayachi and the other properties in Tholuvur were allotted to the shares of Krishnasami, the husband of the first defendant and the plaintiff. Muthusami Padayachi also made it clear that the properties which stood in the name of this first wife Pattayee in the village of Tholuvur were to be taken by her own sons, *viz.*, 4th defendant and the 1st defendant's husband, the plaintiff being not entitled to a share therein. Furthering such a defence, defendants 1 to 3 would say that in pursuance of the said arrangement the sharers who were put in possession of their respective properties so allotted in such an oral partition effected by the common ancestor and in order to avoid any inconvenience in the matter of raising funds on their own respective shares obtained in such an oral partition, a record of such a prior arrangement was made under Exhibit B-1, dated 30th September, 1964 which is characterised as "Attavanai". According to the defendants, including the 4th defendant, Exhibit B-1 is a record of a past transaction and that in it the properties taken over by the plaintiff on the one hand, the 1st defendant's husband and the 4th defendant on the other, were all detailed and delineated and that this was only in evidence and substantiation of such evidence of possession of each of the sharers ever since the oral partition effected by the common ancestor. Defendants would add that ever since 1962, after the death of Muthusami Padayachi each of the branches were in enjoyment of their respective shares so allotted in the oral petition and so delineated in Exhibit B-1 and were paying the kist separately and enjoying the properties as absolute owners thereof besides alienating them for their necessity, benefit and convenience. The defendants 1, 2 and 3 referred to a settlement effected by Krishnasami the eldest son of his wife and children and also to the fact that the said Krishnasami, out of his own funds, acquired some more properties which the plaintiff has claimed as partible properties in the schedules and that some of such items have been alienated by the 1st defendant and that the alienees are in possession of such properties. They refuted the allegation that such properties purchased by Krishnasami after the oral partition were so purchased benami in the name of his wife and that those items are also to be brought into the hotch-pot for division. The defendants 1 to 3 refer to the various aliena-

tions made by the plaintiff and other sharers which were alienations fully supported by consideration and maintained that such properties so alienated by each of the branches are in the possession of the alienees without any interruption, claim or demand by the sharers. Defendants also would claim that at or about the time when the oral partition was effected by the common ancestor Muthiah Padayachi, he divided the movables also as between his sons which included the outstandings due to the family as well. They refer to the allotment of some of the outstandings in favour of the plaintiff who is said to have collected and appropriated the same for himself. They would aver that the other outstandings which were taken over by the other sharers were recovered by them and in some cases by instituting suits for realisation thereof. In those circumstances, the defendants would contend that the plaintiff is estopped by his admission and conduct from claiming any share in either the immovable or movable properties which originally belonged to Muthusami Padayachi and would finally rest their claim on Exhibit B-1 and deny that the plaintiff is entitled to a second partition of already partitioned joint family properties.

3. The 4th defendant in his independent written statement would repeat the allegations made by defendants 1 to 3. He would in particular refer to the oral partition made by Muthusami as also to the "Attavanai". Exhibit B-1, and would say that each of the sons of Muthusami Padayachi took over towards their respective shares the properties allotted by their father and that a division of the movables also had been effected and that therefore the plaintiff's claim for a partition and separate possession of the alleged joint family properties as claimed by him has to be denied and the suit dismissed.

4. The other defendants in the action are alienees who claim that they are *bona fide* purchasers for value and refute the claim of the plaintiff that the properties so purchased by them are to be deemed as joint family properties. The lower Court has summarised as far as possible the defence of each of the alienees and it is unnecessary for us to recapitulate and reiterate them again. The plaintiff, at one stage, has given up defendants 16 to 18.

5. The following issues were framed on the above necessary pleadings:—

(1) Whether the partition list set up by defendants 1 to 4 and other contesting defendants is true and valid?

(2) Whether the other items in the plaint A schedule excepting items 1 to 5, 9 and 21 belonged to Muthusami Padayachi?

(3) Whether item 23 of plaint A schedule was purchased in the name of the 5th defendant by the 4th defendant benami and for the benefit of the 4th defendant and his brothers with their family funds?

(4) Whether the other items of plaint B schedule excepting items 1 to 22 are the family properties of the plaintiff and his two brothers?

(5) Whether the items said to have been purchased in the name of Pattathammal the first wife of Muthusami are benami and purchased by Muthusami with his own funds and for his own benefit?

(6) Whether the C schedule properties belonged to Sampooranathammal, Muthusami's sister and purchased in Muthusami's name benami for her benefit?

(7) Whether the partition set up even during the life time of Muthusami himself in 1962 is true?

(8) What are the outstandings and movables available for partition belonging to the family of plaintiff and his two brothers?

(9) Whether the suit for partition is not maintainable?

(10) Whether the plaintiff is entitled to any and what accounting from the 1st defendant and from out of the assets of Krishnasami?

(11) Whether defendants 12 and 16 to 18 are necessary parties to the suit?

(12) Whether the various alienations by the contesting defendants are true, valid and binding on the plaintiff?

(13) Whether the settlement by Krishnasami in favour of defendants 1 to 3 is true, valid and binding on the plaintiff ?

(14) To what relief is the plaintiff entitled ?

6. The lower Court upheld the contentions of the defendants that there was an oral partition which was made by Muthuswami Padayachi when he was alive and that the said partition was not unequal and that the plaintiff along with the 1st defendant's husband and the 4th defendant were in independent possession and management of such properties in accordance with the said oral partition so effected by the father and that the plaintiff alienated several of such properties pursuant to the "Attavanai", Exhibit B-1, which he characterised as a record of a past transaction and in those circumstances totally accepted the defendants' contention and dismissed the suit.

7. The plaintiff has come up in appeal. Mr. Gopalaswami Iyengar, learned counsel for the appellant, characterises Exhibit B-1 as an instrument on which no reliance can be placed as it is inadmissible in evidence, being a document which is compulsorily registerable and which on its own force created title in the executants of the said documents. Even otherwise, he would say that the oral partition referred to by defendants even if true, is an unequal one and the properties which stood in the name of Pattathammal and which were purchased in the village of Tholuvur, are to be considered and deemed as properties held by her benami for the benefit of the family and in any event should in the circumstances be treated as annexures to family properties, they having been purchased from the surplus income of the family properties. He referred to several improbabilities which surround the alleged oral partition.

8. Firstly, he pointed out that in a civil litigation the 4th defendant who was brought on record as the legal representative of Muthusami Padayachi would say in Exhibit A-10 that the family was a அவிபக்த குடும்பம். Secondly, his contention is that Exhibit B-1 does not contain the signature of the plaintiff and the writing showing that it is his signature is a forgery. He would also refer to the language of Exhibit B-1 itself which refers to the fact that each of the allottees in the said document should take the properties and enjoy them hereafter as absolute owners thereof. The exact language referred to and relied upon by the learned counsel is contained in the various schedules to Exhibit B-1. As an illustration we would say : "எ. அயிட்ட சொத்துக்கள் 1. நபர் கிருஷ்ணசாமி படையாச்சி அடைய வேண்டியது etc." Based on this expression in Exhibit B-1, it is contended that the conferment of title in immovable property springs from another recital in Exhibit B-1 and that therefore, it is doubtful whether there was an earlier oral partition at all. Thirdly, it is said that the very recitals extracted above give the impression that the document, Exhibit B-1, is inadmissible in evidence as it touches on rights in immovable property and is compulsorily registerable. As such no oral evidence could be let in under section 91 of the Evidence Act to project the enforceability or implementability of Exhibit B-1. Fourthly, it is said that the so called partition effected by the father is an unequal one and that there is no evidence that the movables which were large, according to the plaintiff, were ever divided at all as between the sons of Muthusami Padayachi.

9. Countering the said contentions, Mr. Ratnam, learned counsel for the respondents would say that excepting a bare suggestion and a serious suggestion indeed, that Exhibit B-1, does not contain his signature and that the writing in Exhibit B-1 as if it is his signature is a forgery has not been processed through in a manner known to law by examining any expert, or by taking such efforts to establish that it is not his signature. Secondly he would say that there is no proof of surplus income from the joint family properties and as the presumption in law is that the properties standing in the name of a family member of a joint family should be presumed to be her own properties unless proved to the contrary and in the absence of such proof in the instant case the properties which stood in the name of Pattathammal in the village of Tholuvur should be deemed to be her own properties in which the plaintiff as a member of

the coparcenary cannot claim a right by birth. Thirdly, he would say that the division of the properties is equal and there is every reason for the allotment of the properties in Silambur to the 4th defendant as he was by then being fostered and brought up by his uncle Sepperumal, who was none else than the brother of Muthuswami Padayachi and that the properties which stood in the name of Pattathammal were allotted to her own sons, *viz.*, 1st defendant's husband and the 4th defendant.

10. After referring to the above instances which probabilise this scheme of division of the properties among the heirs of Muthusami, he would say that the subsequent conduct of each of the heirs of Muthusawmi positively proves that there was an oral partition and that they were in separate and independent possession of such properties taken over by them pursuant to an oral partition and the plaintiff cannot now complain after having acted upon such an oral partition that there was no partition at all.

11. On the legal objections against the admissibility of Exhibit B-1, he would suggest that the document of this kind in question ought to be considered as a whole and not in a truncated fashion and certain recitals therein should not be torn out of the context so as to destroy the real effect and meaning of the entirety of the document. He referred to certain circumstances to establish that the movables ought to have been divided in the oral partition referred to and finally would say that Exhibit B-1 is the sheet-anchor on which the parties rest their case and they not only relied upon it but acted upon it by alienating the same for the benefit of their respective families whenever they thought it fit, convenient and beneficial. He would, therefore, sustain the judgment of the Court below.

12. Weighing the contention of both the counsel we are satisfied that there was an oral partition effected by Muthusami Padayachi when he was alive and that ExhibitB-1 is only a record of a past transaction and in the oral partition there was not only a division of immovable properties belonging to the family but also the movables and that the properties which stood in the name of Pattathammal which were mainly in the village of Tholuvur were her own properties, in which the plaintiff did not acquire by any provision of law, any right by birth so as to bring these properties also to the hotch-pot for being partitioned amongst the heirs of Muthusami Padayachi. Our reasons are as follows :—

13. We shall now take up first the contention whether Exhibit B-1 contains the signature of the plaintiff and whether it is a true document and whether it requires compulsory registration. It is a cardinal principle of interpretation that the nomenclature or phraseology used by the parties ought not to be the sole guide to understand the document. The entirety of the recitals in the document have to be taken into consideration as a whole without taking one or the other of the sentences therein torn out of its context and thus find the intention of the parties by a wholesome consideration of the totality of the document. The intention of the parties could be gathered not by harping upon and by making an accent on one or the other of the recitals therein but by a fair and equitable reading of the entire document as a whole. We are unable to agree with Mr. Gopalaswami Iyengar that the unique recital in Exhibit B-1 in the schedules thereto which says that :

கிருஷ்ணசாமி படையாச்சி அடைய வேண்டியது. துரைக்கண்ஞு படையாச்சி அடையவேண்டியது. பட்டுசாமி படையாச்சி அடையவேண்டியது.

should be literally understood as vesting clause whereunder proprietary rights were conferred on each of those persons mentioned therein. These are purely descriptive recitals. When we look into the text of Exhibit B-1, it is clear that the parties contemplated to make record of a past transaction. As a matter of fact, the first defendant as D.W. 1 referred to certain inconveniences felt by the heirs of Muthusami Padayachi in the matter of borrowing monies on the properties taken over by them. This was given as the main reason for causing the "Attavanai" to be brought out so that, on more clear and explicit terms the parties could em-

phasise the circumstances under which they came into possession of the family properties and also establish their independent right over it and contemporaneously prove that they are respectively the competent persons to alienate or borrow monies by dealing with such properties in their absolute possession and enjoyment. This reason given by D.W. 1 is rather convincing. In Exhibit B-1, a reference is made to the properties of Pattayee Ammal and how those properties were allotted to her own sons and how the rest of the family properties were divided by their father as between the other members, etc.

14. Mr. Gopalaswami Iyengar again refers to another expression used in Exhibit B-1 :—

இன்று முதல் சர்வ சுதந்திர பாத்தியத்துடன் ஆண்டு அநுபவித்துக் கொள்கிறது.

as a present intention of the executant to confer title in immovable properties. Again, this sentence cannot be read *de hors* the other surrounding circumstances of the case for which purpose it is necessary for us to look into the conduct of the parties, the oral evidence let in and how the plaintiff himself dealt with Exhibit B-1.

15. The plaintiff's case is that the document is a forgery. One who accuses the other parties to the litigation of such a serious misdemeanour cannot be complacent without furthering his contention and proving a serious allegation like forgery. It is surprising in this case that the plaintiff has not moved his little finger, or taken any steps known to law to establish that Exhibit B-1 is a forgery.

16. As against this, we have the evidence of D.Ws. 1 to 3. D.W. 1 is not inimical with the plaintiff. He is the writer of the document. He speaks to the fact that Exhibit B-1 was thought of in order to enable the plaintiff, the 1st defendant's husband and the 4th defendant to deal with the said properties by themselves and as owners thereof; in order to make such a past title which vested in them in an oral partition, a formal "Attavanai" was thought of so as to delineate the properties secured by each of them in the quondam oral partition. D.Ws. 2 and 3 are attestors. Nothing is suggested by the plaintiff as against them. It is, therefore, very difficult for us to discard Exhibit B-1 as a document which is suspicious and as an instrument which does not contain the signature of the plaintiff as sworn to by him. We accept the evidence of D.Ws. 1, 2 and 3 and would concur with the trial Court and hold that Exhibit B-1 does contain the signature of the plaintiff. The lower Court was right in having invoked the normal rule of comparison of signatures to find whether Exhibit B-1 was signed by the plaintiff or not. On such a comparison we find that the signature in Exhibit B-1 resembles the signature of the plaintiff. After such an investigation and which we characterise as the right methodology to adopt in such circumstances, the Court below found that Exhibit B-1 is a validly executed document and was signed by the plaintiff, the 1st defendant's husband and the 4th defendant.

17. Mr. Gopalaswami Iyengar, however, says that even if it does contain the signature of the plaintiff, it is not admissible in evidence. We have already referred to the fact that an instrument of this kind as Exhibit B-1 should be interpreted as a whole and not in a truncated fashion. Certain recitals therein ought not to be projected to prominence to understand the real purpose of it. That there was an oral partition has been accepted by us. That D.Ws. 1 to 3 who were present at the time when Exhibit B-1 was entered into, speak to the declaration made by the parties that there was such an oral partition when the father was alive. If we accept, therefore, that there was an oral partition, it is easy to find and gather the intention of the parties in Exhibit B-1. The recitals referred to by Mr. Gopalaswami Iyengar cannot take away the real purpose and intent which predominates Exhibit B-1. We accept Exhibit B-1 as a mere record of a past event and which past event is referable to a prior oral partition effected by the father when he was alive. It, therefore, follows that Exhibit B-1 is not a compulsorily registerable document and that section 91 of the Evidence Act is not a bar for letting in oral evidence regarding

the recitals in Exhibit B-1 which is merely a record of a past or quondam event. Exhibit B-1 does not create rights or touch upon rights either in immovable or movable properties. We are unable, therefore, to accept the contention of Mr. Gopalaswami Iyengar that Exhibit B-1 cannot be looked into for any purpose.

18. The main contention of the learned counsel for the appellant is that the properties in Tholuvur which stood in the name of Pattayee Ammal are to be, having regard to the affluence of the family, treated as joint family properties. The argument is attractive. No doubt, Muthusami Padayachi obtained about 18 acres of land in the partition effected as between himself and his brothers. Probably, the quantum of the share obtained by Muthusami Padayachi was greater. But that by itself does not lead to the presumption that such a corpus of joint family properties would yield surplus income. The plaintiff has not taken the precaution to prove that the family income from such properties obtained by Muthusami Padayachi was so abundant that it always resulted in a surplus which surplus could be utilised for further annexations to erstwhile joint family properties. It has now become almost axiomatic that properties purchased by one or the other of the members of a coparcenary or joint family when the family is joint cannot as a matter of course be treated as joint family property. The coparcener who challenges such title in the member and pleads that they should also be brought to the hotch-pot, ought to establish by cogent and mature evidence that there was enough surplus income which was available in the joint family and which positively could be the foundation for such annexures made by one or the other of the members of the joint family. In the absence of such nexus between the purchase price of the purchased properties and the available surplus of the joint family, the presumption that the properties in the names of the members of a coparcenary should automatically be treated as joint family properties would fail. In all cases definite proof is required that the further purchase in the names of joint family members ought to have been made and could not have been made otherwise than from the surplus income of the family. For a greater reason, the rule is more strict in the case of properties in the name of female members. From time immemorial it has become customary amongst Hindus at any rate for females to have properties of their own. Even our Sastras describe such property of a female as Stridhana property. Therefore, the concept that a female could own properties of her own is an age-long concept. If this concept therefore has been an accepted one from ages, then the fact that a female member in a joint family has properties in her own name would not necessarily lead to the conclusion that the origin of such properties should be traced to the joint family or to the income from the joint family. This principle also is well established.

19. In *Nagayasami Naidu* v. *Kochadai Naidu*[1], the Division Bench of this Court consisting of Ramamurti, J. and Alagiriswami, J., as he then was, upheld the wholesome principle and said it is for the parties who claim properties as joint family properties to specifically plead the particulars and details in the pleadings and establish the same by adducing necessary evidence. If there is no pleading and if on the side of the plaintiffs there is no evidence, there is no need for detailed scrutiny of the case of female members or persons claiming through them, as to the resources of the female members and as to how they acquired the properties in question. More stronger language is not necessary to reject the contention of the plaintiff in the instant case that the properties which stood in the name of Pattathammal are to be deemed and held as her own properties. Excepting for the bare *ipse dixit* of the plaintiff, there is no acceptable material for us to reject the real title of Pattathammal in the properties purchased her in Tholuvur village. There is also evidence in this case that Pattathammal's parents were rich and that they provided the necessary funds to Pattathammal to purchase the properties. Incidentally the plaintiff's case is that such properties were held by Pattathammal benami for the family. The theory of

1. (1970) 1 M.L.J. 105: I.L.R. (1969) 1 Mad. 459 : 81 L.W. 436 : A.I.R. 1969 Mad. 329.

benami also depends on express pleadings followed up by clear proof. There is, of course, pleadings in this case but proof is completely absent. As argued by Mr. Ratnam there was no necessity also for Muthusami Padayachi to purchase these properties in the name of his wife. By then, he became a divided member and partitioned his share of the properties of his ancestors. It is not suggested that Muthusami was indebted and that he wanted to screen the properties from his creditors. Such reason is normally present in a case where properties are taken by "A" in the name of "B". Either it is for the purpose of avoidance of creditors or for love and affection or for the purpose of accelerating title in his near and dear, the method of securing properties in fictitious names is resorted to. But in the instant case, the plaintiff has miserably failed to establish that there was any such occasion for Muthusami Padayachi to purchase these properties in the name of his wife. Taking all these circumstances into consideration, we are unable to accept the contention of Mr. Gopalaswami Iyengar that the properties in Tholuvur village in the name of Pattathammal should be deemed to be the properties held by her benami, but for the benefit of the family.

20. The alternative case of Mr. Ratnam that even if Exhibit B-1 does not clearly set out the case of the parties, the conduct of the plaintiff and the other members of the family to establish that there was an oral partition is certainly worthy of credence and acceptance. Under Exhibits B-16 to B-24, the plaintiff disposed of the various properties reciting therein that he secured the properties in a partition and that he is the full owner thereof. Similar recitals are contained in Exhibits B-11 to B-15 which are the instruments under which the properties of the family were alienated by the first defendant's husband. In fact, the 1st defendant herself under Exhibits B-7 to B-10 and B-27 sold certain properties on the foot of the settlement made by her husband in her favour pursuant to the oral partition effected. Such specific and proved conduct of the plaintiff in having treated the properties allotted to him as his own properties and particularly the recitals made by him in the various deeds that those properties are his properties and which he secured at a partition, are singular instances to show that the plaintiff cannot approbate and reprobate and give up the oral partition set up by the defendants for the sake of a second partition in this action.

21. We are unable to accede to the contention of the learned counsel for the appellant that the partition is not fair, but unequal. Muthusami Padayachi took the precaution of dividing the properties belonging to Pattayee Ammal amongst her own sons, *viz.*, the first defendant's husband and the 4th defendant. He gave a share to the plaintiff and the other two sons in Silambur properties which were ancestral properties, after taking into consideration the allotment made by him in favour of the sons through his first wife. Excepting for stating that the partition is unequal or excepting for the plaintiff as P.W. 1 speaking about it, there is nothing which suggests such inequality. At this juncture, it would be convenient to refer to the evidence of P.W. 2. He is the Karnam of Tholuvur. He refers to the properties of Pattayee Ammal. He proceeds to say that *patta* of such properties stood in the name of Pattayee Ammal. He admits that for a considerable time the properties which stood in the name of Pattayee Ammal have been transferred in the name of Krishnasamy Padayachi and the 4th defendant. As regards the properties in Silambur, he would admit that the plaintiff on application has obtained a *patta* over the properties which he has obtained (obviously in the oral partition) in the village of Silambur. He also admits that the alienees from the plaintiff are in possession of the properties purchased by them. In the light of the evidence let in by the plaintiff it does not lie in the mouth of P.W. 1 to still contend that there was no oral partition as pleaded by the plaintiff.

22. The last part of the case is whether there was a division as to movables. There are two circumstances, at any rate, to support the defendants' theory that even the movables were divided at the time when the oral partition was effected. Exhibit A-69 was one of the promissory

notes executed by P.W. 6 in favour of Muthusami Padayachi. After Muthusami Padayachi's death, D.W. 1's husband filed a suit on the said promissory note in O.S. No. 621 of 1964, on the file of the District Munsif's Court, Vridhachalam and obtained a decree. Not satisfied with having obtained such a money decree, he brought the property of the judgment-debtor to sale and in the Court-auction held for that purpose, he purchased the property. The plaintiff, who is so active, would not have kept quiet if the promissory note on which the suit was laid by the 1st defendant's husband was family property and when the 1st defendant's husband was processing through Court to realise the monies for himself under it. The second instance is seen from Exhibits A-56 and A-59. These were promissory notes executed by one Nataraja in favour of Muthusami Padayachi. P.W. 11 is the son of Nataraja. Herein also the suits were laid by Krishnasamy, the husband of 1st defendant. He issued suit notices prior to the institution of the suit. They are Exhibits A-105 and A-106. In the said notices, he demanded the said amounts in his individual capacity and not as head of the family or manager of joint family. These two instances are referred to by us only to support the defendants' theory that in the oral partition not only the immovables but also movables were divided as between all the parties who were entitled to it.

23. We are therefore, satisfied that there was an oral partition which was effected by Muthusamy when he was alive, that the allotment of the properties in favour of the plaintiff and the other sharers is not unequal; that the properties which stood in the name of Pattayee in the village of Tholuvur are her properties in which the plaintiff cannot project any right, title or interest and that in the said partition both immovables and movables were divided and lastly Exhibit B-1 is a record of a past oral partition effected as above. The plaintiff has therefore failed to establish that a cause has arisen for him to seek another partition when there was an earlier partition. The lower Court was right in having dismissed the suit.

24. The appeal fails and is dismissed with costs.

R.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, J.*

Lakshmi Ammal ... *Appellant**

v.

Rakkayi Ammal and others .. *Respondents.*

Stamp Act (II of 1899), section 35—Promissory note—Suit on—Insufficiently stamped—Not admissible in evidence—Pronote alleged to be issued in respect of past debts—No mention however in the pronote—Endorsements cannot prove the past debts.

The plaintiff filed a suit on a promissory note dated 15th May, 1959 for Rs. 1,500, marked as Exhibit A-4. The pronote was insufficiently stamped. The plaintiff claimed that this pronote was issued in respect of a pronote dated 1st August, 1956 for Rs. 500, a pronote dated 1st December, 1956 for Rs. 500 and another pronote dated 31st May, 1957 marked as Exhibits A-1, A-2 and A-3 respectively. The suit was dismissed by the lower Courts holding that the promissory note Exhibit A-4 was insufficiently stamped and was not admissible in evidence and the suit was barred by limitation in respect of the earlier debts. There was also no reference in Exhibit A-4 to the earlier debts. On Second Appeal,

Held: It is admitted that Exhibit A-4 was insufficiently stamped, as a promissory note. Therefore, by virtue of section 35 of the Indian Stamp Act, it must be held that it cannot be admitted in evidence even for the purpose of showing that it constituted an acknowledgment of a pre-existing liability. [*Para.* 2.]

Exhibit A-4 cannot be admitted in evidence even for the purpose of saving limitation, under the original cause of

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*S.A. No. 2053 of 1972. *9th December, 1975.*

action, namely, loans advanced under Exhibits A-1, A-2, and A-3.

[Para. 3.]

Cases referred to :—

Ram Rattan v. *Parma Nand*, (1946) 73 I.A. 28 : (1946) 1 M.L.J. 295 : 59 L.W. 196 : A.I.R. 1946 P.C. 51; *Penatapati Nageswara Rao*, v. *Moka Narayanamurthi and another*, (1937) 2 M.L.J. 805 : I.L.R. (1938) Mad. 210: 46 L.W. 692 : 1959 I.C. 24 : A.I.R. 1938 Mad. 75; *Meenammal* v. *S. N. Oavai Reddiar and another*, (1960) 73 L.W. 11 : (1960) 1 M.L.J. 319 : I.L.R. (1960) Mad. 358 : A.I.R. 1960 Mad. 237.

Appeal against the decree of the Court of the Subordinate Judge (Prl.) of Madurai in Appeal Suit No. 235 of 1969, preferred against the decree of the Court of the District Munsif (II Addl.) of Madurai Town in Original Suit No. 685 of 1967.

S. Ramasubramaniam, for King and Patridge, for Appellant.

V. T. Gopalan and *Mrs. Radha Gopalan*, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff in O.S. No. 685 of 1967 on the file of the Court of the District Munsif of Madurai Town, who lost before the Courts below is the appellant herein. The suit was instituted for recovery of the amount said to be due under a promissory note dated 15th May, 1959 marked as Exhibit A-4, said to have been executed by the respondent herein in favour of the deceased Parthasarathi Iyengar for a sum of Rs. 1,500. It was the case of the appellant herself that no cash was paid on the date of Exhibit A-4; that prior to Exhibit A-4 the respondent had borrowed a sum of Rs. 500 under a promissory note dated 1st August, 1956 marked as Exhibit A-1, another sum of Rs. 500 under a promissory note dated 1st December, 1956 marked as Exhibit A-2 and a third sum of Rs. 500 under another promissory note dated 31st May, 1957 marked as Exhibit A-3; and that consolidating all the three amounts only, the suit promissory note Exhibit A-4 was executed in lieu of the said three promissory notes. One of the contentions raised by the respondent was that the promissory note Exhibit A-4 was insufficiently stamped and therefore it could not be sued upon. Thereafter the appellant sought to recover the money on the basis of the original cause of action and the suit was ultimately disposed of on that basis. With regard to the claim of the appellant to recover the amount on the basis of the original cause of action, it was held by the Courts below that the suit was barred by limitation and, therefore the suit instituted by the appellant was dismissed. It is against the said dismissal, the present second appeal has been filed.

2. Exhibit A-4 promissory note itself contains two endorsements of payment, one dated 20th March, 1962 marked as Exhibit A-9 and the other dated 4th March, 1965 marked as Exhibit A-10. The suit itself was instituted only on 23rd October, 1967. On the face of it, the original cause of action, namely, in respect of the three sums of Rs. 500 each referred to above, having arisen on 1st August, 1956, 1st December, 1956 and 31st May, 1957 respectively, the suit instituted in 1967 was barred by limitation unless the appellant could base her claim on any acknowledgment. According to the appellant, Exhibit A-4 itself constituted as acknowledgment because it refers to the borrowing of Rs. 1,500. The Courts below have held that Exhibit A-4 could not constitute an acknowledgment and that even if it constituted an acknowledgment, the same would not be admissible in evidence and that consequently the appellant could not succeed on the basis of any such acknowledgment as contained in Exhibit A-4. I am of the opinion that the conclusion of the Courts below on this point is correct. In the first place, Exhibit A-4 itself does not refer to any debts outstanding as on the date on which Exhibit A-4 promissory note was executed. The recital in Exhibit A-4 proceeds as if on the date of Exhibit A-4 the respondent borrowed a sum of Rs. 1,500 from the deceased Parthasarathy Iyengar. Once it is admitted that no amount was borrowed by the respondent on the date of Exhibit A-4

and that Exhibit A-4 was only a consolidated promissory note in lieu of Exhibits A-1, A-2 and A-3, it will follow that Exhibit A-4 does not constitute an acknowledgment of liability with regard to the amounts borrowed on 1st August, 1956, 1st December, 1956 and 31st May, 1957 respectively. Secondly, even assuming that Exhibit A-4 can be said to constitute an acknowledgment of liability, still Exhibit A-4 not being admissible in evidence, there is no acknowledgment of liability in law. It is admitted that Exhibit A-4 was insufficiently stamped as a promissory note. Therefore, by virtue of section 35 of the Indian Stamp Act, it must be held that Exhibit A-4 cannot be admitted in evidence even for the purpose of showing that it constituted as acknowledgment of a pre-existing liability. Section 35 of the Stamp Act states that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped. The scope of the expression, "for any purpose" occurring in this section has been the subject-matter of consideration by the Courts and the Privy Council in *Ram Rattan* v. *Parma Nand*[1]. observed:

> "A document admitted in proof of some collateral matter is admitted in evidence for that purpose, and the statute enacts that it shall not be admitted in evidence for any purpose. Their Lordships see no reason why the words, 'For any purpose' in the Indian Act of 1879 should not be given their natural meaning and effect. Such words may well have been inserted by the Legislature to get rid of the difficulties surrounding the question of what amounted to a collateral purpose."

3. The question involved in the present case came to be directly considered by a Bench of this Court in *Penatapati Nageswara Rao* v. *Moka Narayanamurthi and another*[1]. In that case, a promissory note was executed reciting the debts already due under earlier promissory notes. The promissory note itself was insufficiently stamped, and on that account it was held to be inadmissible in evidence. However, it was contended before the Court that that portion of the promissory note which recited the previous promissory notes should have been admitted and if so admitted that would have saved the limitation in respect of the earlier instruments. This contention was rejected by the Court. The judgment starts by saying :

> "The question raised by this petition is whether an improperly stamped promissory note can be admitted in evidence to prove acknowledgment of liability in order to save limitation in respect of promissory notes previously executed."

Having thus stated the question that came to be considered, the Bench proceeded to state:

> "The section itself, in my opinion provides a complete answer to the petitioner's case. If an unstamped document cannot be admitted for any purpose it must mean, if the words are to be given their ordinary and plain meaning that it cannot be admitted under any circumstances in a civil suit. If the Legislature in placing this provision of law on the statute book had intended to allow unstamped instruments to be admitted for collateral purpose; it would surely have said so. It did not say so, but on the other hand it provided that a negotiable instrument which is insufficiently stamped at the time of execution cannot be properly stamped afterwards, even on payment of a penalty which is allowed in the case of other documents."

Thus, the Bench held that insufficiently stamped promissory notes cannot be admitted in evidence even to prove the acknowledgment of a liability in order to save limitation in respect of promissory

1. (1946) 73 I.A. 28 : (1946) 1 M.L.J. 295: 59 L.W. 196 : A.I.R. 1946 P.C. 51.

1. I.L.R. (1938) Mad. 210 : 46 L.W. 692: 175 I.C. 24 : (1937) 2 M.L.J. 805 : A.I.R. 1938 Mad. 75.

notes previously executed. In my opinion, this decision directly applies to the facts of this case, and, therefore, Exhibit A-4 cannot be admitted in evidence even for the purpose of saving limitation, under the original cause of action, namely, loans advanced under Exhibits A-1, A-2 and A-3 already referred to.

4. Mr. S. Ramasubramaniam, learned counsel for the appellant, repeatedly relied on the judgment of Rajagopalan, J., in *Meenammal* v. *S. N. Oavai Reddiar and another*[1]. I am of the opinion that that decision has no application whatever to the facts of this case. In that case a promissory note was executed for a sum of Rs. 320. But that promissory note could not be admitted in evidence because it was insufficiently stamped. Therefore, the plaintiff therein laid the suit on the original cause of action, the debt itself, independent of the promissory note. The promissory note itself was marked as Exhibit A-1. There were endorsements of payment on Exhibit A-1 which were marked as Exhibits A-2, A-3 and A-4 and the plaintiff relied on those endorsements of payment to save the claim based on the original cause of action from being barred by limitation. The learned Subordinate Judge accepted the plaintiff's case that the promissory note in question was executed as security for the debt subsequently on the date on which the advance of loan was made and he also upheld the plaintiff's contention that the suit was maintainable on the original cause of action, the debt, even though Exhibit A-1 was inadmissible in evidence as a promissory note. However, he took the view that the endorsements Exhibits A-2, A-3 and A-4 on which the plaintiff relied, could not save the claim to recover the debt itself from being barred by the law of limitation, as, in the opinion of the learned Judge, Exhibits A-2 to A-4 did not purport to acknowledge the debt itself. Rajagopalan, J., considered only this question and pointed out that when the defendant in that suit made payment towards the promissory note, it was obvious that what was paid was towards the debt evidenced by the promissory note, and what was acknowledged successively in Exhibits A-2, A-3 and A-4, was the subsistence of the debt itself, which the parties then believed at the time was evidenced by Exhibit A-1 in the sense that Exhibit A-1 would be admissible in evidence to prove the existence of the debt itself. In other words, the learned Judge reversed the conclusion of the learned Subordinate Judge that Exhibits A-2 to A-4 did not operate as acknowledgments of the debt itself and held that Exhibits A-2 to A-4, even though they purported to acknowledge the liability under the promissory note, constituted acknowledgment of the debt evidenced by the promissory note Exhibit A-1. The learned Judge had no occasion to consider the question whether Exhibit A-1 promissory note could have been admitted to prove any acknowledgment of the antecedent liability. Therefore, the judgment of Rajagopalan, J., relied on by the learned counsel for the appellant is not of any assistance whatever to the appellant herein.

5. In this case, the appellant also relied on Exhibits A-9 and A-10 endorsements of payment contained in Exhibit A-4. Even applying the judgment of Rajagopalan, J., that will govern only the acknowledgments Exhibits A-9 and A-10 and it will not govern Exhibit A-4, the promissory note itself. I have already referred to the dates of the three debts, namely, 1st August, 1956, 1st December, 1956 and 31st May, 1957. Unless there had been an acknowledgment in writing of the liability before the expiry of the period of limitation with reference to these three debts, the appellant cannot succeed and in this case Exhibits A-9 and A-10 came into existence in 1962 and 1965 respectively, that is, long after the expiry of the period of limitation with reference to Exhibits A-1, A-2 and A-3. If at all there is any acknowledgment in writing with reference to the debts evidenced by these three documents before the expiry of the period of limitation applicable to them, it is Exhibit A-4 only and that Exhibit A-4 is not admissible in evidence even as an acknow-

1. (1960) 73 L.W. 11 : (1960) 1 M.L.J. 319: I.L.R. (1960) Mad. 358 : A.I.R. 1960 Mad. 237.

ledgment of liability and therefore in law there is no acknowledgment of liability in respect of the debts evidenced by Exhibits A-1, A-2 and A-3. Hence, the suit of the appellant was rightly dismissed by the Courts below. Accordingly the second appeal fails and is dismissed. There will be no order as to costs. No leave.

S.J. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*V. Ramaswami and V. Sethuraman, JJ.*

Tiruvalargal Krishnados Kikani Cotton, Cloth, Yarn and Textiles Dyes, Coimbatore .. *Petitioner**

v.

The State of Tamil Nadu represented by the Deputy Commissioner (CT) Coimbatore .. *Respondent.*

Tamil Nadu General Sales Tax Act (I of 1959), *section* 2 (*n*)—*Textile chemicals, etc.*—*Import of*—*Licence in name of assessee*—*Agreement between assessee and purchaser for sale of goods imported*—*Import consequent on agreement*—*Transaction within State*—*Whether sale exigible to tax*—*Transaction, when sale in course of import.*

Privity of contract between the ultimate purchaser and the foreign seller is necessary to make a transaction a sale in the course of import. It is immaterial that the local purchaser had helped the importer in the import of the goods by finding out the foreign seller or assisting him in the placing of orders or clearing the goods from the port. [*Para.* 4.]

The assessee was granted licences to import textile chemicals, dyes etc. These licences were not transferable. M/s. R.D.F. agreed to buy from the assessees imported dyes and chemicals. This was evidenced by a letter and a formal agreement. The buyers were to pay a premium on receipt of which the assessees were to hand over the licences to M/s. R.D.F. to take steps to import the goods in the name of the assessees. The assessees would place an order with the foreign sellers suggested by M/s. R.D.F. for the quantity of goods required by the purchasers. In the instant case, the assessees were taxed on the sales made by them of the imported goods. The assessees contended that they were only agents of M/s. R.D.F. and that there was actually no sale by them and that they would not be liable to tax.

Held : In this case, the licensed importer was the assessees and the purchasers had no right to import and therefore could not have placed an order with the foreign seller. There was a sale by the assessees to the purchasers M/s. R.D.F. in respect of these transactions which were liable to tax under the Tamil Nadu General Sales Tax Act. [*Para.* 5.]

Cases referred to:—

Khosla and Company (P.) Ltd. v. *Deputy Commissioner of Commercial Taxes, Madras Division*, (1966) 17 S.T.C. 473: (1966) 3 S.C.R. 352: (1966) 2 S.C.J. 703: (1966) 2 An.W.R. (S.C.) 81 : (1966) 2 M.L.J. (S.C.) 81: A.I.R. 1966 S.C. 1216; *Deputy Commissioner of Agricultural. Income-tax and Sales Tax, Central Zone, Ernakulam* v. *Kotak and Company*, (1973) 32 S.T.C.6; *Binani Bros (P.) Ltd. and another* v. *Union of India and others*, (1974) 33 S.T.C. 254; *Mohd. Serajuddin* v. *State of Orissa*, (1975) 36 S.T.C. 136 : (1975) 2 S.C.C. 47: A.I.R. 1975 S.C. 1564; *State of Tamil Nadu* v. *Visweswara Das Gokuldas*, (1975) 36 S.T.C. 479.

Petitions under section 38 of the Tamil Nadu General Sales Tax Act, 1959 praying the High Court to revise the order of the Court of the Tamil Nadu Sales Tax Appellate Tribunal, (Additional Bench), Coimbatore, dated 10th March, 1970 and made in C.T.A. Nos. 341 of 1968, 342 of 1968, 340 of 1969, 238 of 1968 and 415 of 1968 respectively in T.C. Nos. 461 to 465 of 1970 and T.A. No. 199 of 1971 in T.C. No. 52 of 1972, dated 14th May, 1971 (against the order of the Appellate Assistant Commissioner of Commercial

*T.C.Nos. 461 to 465 and 52 of 1972.

19*th November*, 1975.

Taxes, Coimbatore in Appeal Nos. 279 of 1966, dated 31st January, 1967, Appeal No. 15 of 1967, dated 30th March, 1969, Appeal No. 188 of 1966, dated 6th December, 1966, Appeal No. 326 of 1966, dated 7th October, 1967, Appeal No. 320 of 1967, dated 17th June, 1967 and Appeal No. 288 of 1969, dated 25th September, 1961 respectively against the orders of the Deputy Commercial Tax Officer, Coimbatore, in M.G.S.T. 5612 of 1960-61, dated 31st March, 1966, 5931 of 1965-66, dated 8th December, 1966, 5931 of 1964-65, dated 15th January, 1966 ; 5931 of 1963-64, dated 20th February, 1965 ; 5931 of 1961-62, dated 29th March, 1969 and M.G.S.T.A. 17675 of 1962-63, dated 26th March, 1965 respectively.

K. Srinivasan and *R. Gangadharan*, for *K. C. Rajappa*, for Petitioner.

The Additional Government Pleader No. I, for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—The assessee in this batch of cases are dealers in cloth, cotton yarn, dyes and chemicals carrying on business at Coimbatore. They are also exporters and importers of cotton, cotton yarn, dyes and chemicals. In the returns for the assessment years 1960-61 to 1965-66 in respect of a portion of turnover relating to sales of dyes and chemicals they contended that the sales are exempt as import sales. They contended that the sales were effected on forward or afloat basis, that the importation of those goods were made by the Radha Dyeing Factory, hereinafter called as the purchasers, by paying the value of the goods including customs duty and that the assessees acted only as agents of the purchasers to whom the goods were sold. In this connection, they relied on a preliminary agreement between them and the purchasers as evidenced by their letter, dated 15th March, 1960 and a later formal agreement, dated 7th of April, 1961. The facts relating to these turnovers as evidenced by this letter and the agreement are as follows :—

2. In respect of their export of cotton yarns and cotton textiles under the Cotton Textile Export Promotion Incentive Scheme; the assessees were granted import licences for the importation of textile chemicals, dyes and gums. These licences however were not transferable. M/s. Radha Dyeing Factory agreed to purchase from the assessees imported dyes and chemicals. The terms and conditions of such sale and purchase between the assessees and the purchasers are evidenced by the letter dated 15th March, 1960 and the formal agreement, dated 7th April, 1961. Under this agreement, the assessees agreed to sell to the purchasers on monopoly basis the imported goods on forward, afloat or c.i.f. basis. The prices for each transaction will have to be settled by agreement between the parties. Towards the sale price, the purchasers have to pay to the sellers a premium at a certain percentage or a fixed amount as may be settled which would be the margin of profit of the assessees in full or a portion of the sale price. On receipt of this money, the assessees would credit the sum in his books to the account of the purchasers treating the same as part of the sale proceeds received. As soon as the purchasers paid the premium or part of the price, the assessees agreed to hand over the licence or licences so as to enable the purchasers to take steps to import the goods in the name of the assessees. The assessees would place an order with the foreign sellers suggested by the purchasers for the quantity of goods required by the purchasers. They would also open a letter of credit through a bank or otherwise. All the import documents would have to be in the name of the assessees and the assessees agreed to subscribe their signatures to all the papers and documents so as to make the importation possible. But the purchaser would have to pay the amount as per the invoices of the foreign sellers and also the customs and excise dues, wharf charges, clearing and forwarding charges and all such other dues including sales tax, if any payable. Even the bank charges for the opening of the letters of credit will have to be met by the purchasers. The assessees also had to subscribe their signatures to all the documents to enable the purchasers to get delivery of the goods from the port through customs and the forwarding agents of the assessees and also render all possible help to fulfil the terms of the

agreement. If, after receiving the premium or part of the price as referred to above, the purchasers fail to take necessary steps for importation of the goods in the name of the assessees within the time allowed according to the licence or fail to utilise the licence or licences or cause the credit to expire, the advance amount received by the assessees as part of the sale price is liable for forfeiture. The agreement also provided that the assessees were at liberty after an advance information to the purchasers to make sales of imported goods to others or deliver the licence or licences at their option to anybody else, if the assessees were not able to get a fair profit from the purchasers.

3. On these facts, the assessing and appellate authorities held that there were two sales, one by the foreign sellers to the assessees which was an import sale and another, a sale by the assessees to the purchasers which was a local sale and that the turnovers relating to the local sale were liable to be assessed under the Tamil Nadu General Sales Tax Act. The assessment orders relating to the assessment years 1960-61, 1961-62 and 1963-64 to 1965-66 were taken in appeal to the Sales tax Appellate Tribunal, Coimbatore, while the assessment order relating to the assessment year 1962-63 was taken in appeal to the Sales Tax Appellate Tribunal, Madras. The Madras Tribunal held that there were no two sales, that the agreement between the purchasers and the assessees and the contract of sale between the assessees and the foreign sellers were two integrated transactions forming one import sale and that therefore the turnover in question was not liable for sales tax. On the other hand, the Coimbatore Tribunal held that there were two contracts for sale, one between the assessees and the purchasers and another between the foreign sellers and the assessees and that only the sale of the foreign seller to the assessees was an import sale and the sale by the assessees to the purchasers was liable to sales tax. Against the order of the Coimbatore Tribunal, the assessees have filed T.C. Nos. 461 to 465 of 1970 and against the order of the Madras Tribunal, the department has filed T.C. No. 52 of 1972.

4. In these petitions, the learned counsel for the assessees strenuously contended that there was only one transaction of sale which was an import sale and that the assessees were acting only as agents for their purchasers and there were no two transactions of sale. In this connection he also relied strongly on the decision in *Khosla & Co. (P.) Ltd.* v. *Deputy Commissioner of Commercial Taxes, Madras Division*[1] and *Deputy Commissioner of Agricultural Income-tax and Sales Tax, Central Zone, Ernakulam* v. *Kotak & Co.*[2]. On the other hand, the learned Government Pleader contended that in view of the later decisions reported in *Binani Bros. (P.) Ltd. and another* v. *Union of India and others*[3], and *Mohd. Serajuddin* v. *State of Orissa*[4] unless there is a direct contract between the purchasers and the foreign seller, it could not be treated as an import sale and that in this case there were two sales, one by the foreign seller to the assessees and the other by the assessees to the purchasers. The learned Government Pleader also relied on a decision of this Court reported in *State of Tamil Nadu* v. *Visweswara Das Gokuldas*[5] (the facts of which are very similar with the facts of this case. In *Khosla & Co. (P.) Ltd.* v. *Deputy Commissioner of Commercial Taxes*[1] the relevant facts were these. The assessee entered into a contract with the Director-General of Supplies and Disposals, New Delhi, for the supply of axle-box bodies. The goods were to be manufactured in Belgium, according to the specifications. In order to fulfil the contract, the assessee entered into a contract with the manufacturer in Belgium. The goods were got manufactured and imported in India and cleared at the Madras Harbour and supplied to certain parties on the instructions of the Director-General of Supplies and Disposals. There was no privity of contract

1. (1966) 17 S.T.C. 473 : (1966) 3 S.C.R. 352 : (1966) 2 S.C.J. 703 : (1966) 2 An.W.R. (S.C.) 81 : (1966) 2 M.L.J. (S.C.) 81 : A.I.R. 1966 S.C. 1216.

2. (1973) 32 S.T.C. 6.

3. (1974) 33 S.T.C. 254.

4. (1975) 36 S.T.C. 136: (1975) 2 S.C.C. 47: A.I.R. 1975 S.C. 1564.

5. (1975) 36 S.T.C. 479.

between the Belgiuan manufacturers and the Government departments who ultimately received the supplies. The Supreme Court, held that the movement of the goods from Belgium into India was incidental to the contract entered into by the assessee with the Director-General of Supplies and Disposals, that there was no possibility of the goods being diverted by the assessee for any other purpose and that therefore the sale took place in the course of import of goods within section 5 (2) of the Central Sales Tax Act and was exempt from taxation. In *Deputy Commissioner* v. *Kotak & Co.*[1], a textile mills which had an import licence gave a letter of authority to a firm which was the assessce in that case to import the goods and deliver them to it. The mills specified in the contract entered into between them and the assessee the quantity of all the imported cotton to be supplied, its quality and the place from where it was to be imported. The payment was to be made by the mills against the documents. The letter of authority provided that the firm " will act purely as an agent of the licensee (mills) and the goods imported will be the property of the licence-holder both at the time of clearance through the customs and subsequent thereto. The licence-holder will have to ensure that the goods on importation will be delivered to him and shall not be disposed of otherwise. The licensee shall not cause or permit the holder of the letter of authority to dispose of the goods." After the goods were shipped at the foreign port, the bill of lading and other documents were forwarded through bank to the firm and those documents were received by the firm after payment of their value. Upon information being given the mills made the payment in accordance with the contract and thereafter the goods were cleared and delivered to the mills by clearing agents. The question for consideration was whether the sales of cotton effected to the mills were sales in the course of import within the meaning of section 5 (2) of the Central Sales Tax Act. The Supreme Court held that the import licence was issued to the mills, that the assessee-firm was precluded from selling to anybody other than the mills to whom the user's import licence had been granted and that by virtue of the letter of authority given, the assessee-firm was acting purely as an agent of the licensee and the goods imported was the property of the licence-holder both at the time of clearance through customs and subsequently thereto. Accordingly, the Supreme Court held that the sales in question were sales of import within the meaning of section 5 (2) of the Central Sales Tax Act. In *Binani Bros. (P.) Ltd. v. Union of India*[1], the assessee was a company incorporated under the Indian Companies Act. They were importers who were dealers in non-ferrous metals like zinc, lead, copper, tin, etc., and were on the approved lists of registered suppliers to the Director-General of Supplies and Disposals. Under the various control orders, sale and distribution of copper was not free, but controlled and it will have to be distributed only under the directions of the Controller of non-ferrous metals to such of those licence-holders to whom such permission was given. The assessee imported and supplied certain non-ferrous metals to certain Government departments and charged salestax. On the basis of the decision in *Khosla & Co. (P.) Ltd.* v. *Deputy Commissioner of Commercial Taxes, Madras Division*[2], the amount paid as sales tax to the assessee was sought to be recovered by the concerned Government department. But the assessee was not able to satisfy the West Bengal State Sales Tax Authorities that there was only one import sale and that therefore he was not liable to pay sales tax. On the other hand, the sales tax authorities took the view that there were two sales involved in that transaction, a sale to the assessee by the foreign sellers and a sale by the assessee to the various Government departments and that the sale by the assessee to the various Government departments was liable to sales tax. The question for consideration was whether in those circumstances there was only one import sale or whether there was an import sale and a local sale. The Supreme Court held that though the purchase by the assessee might be considered as one for the purpose of sale to the Government departments,

1. (1973) 32 S.T.C. 6.

1. (1974) 33 S.T.C. 254.
2. (1966) 3 S.C.R. 352 : (1966) 2 S.C.J. 703 : 17 S.T.C. 473.

there were two transactions, one, a sale by the foreign seller to the assessee and another by the assessee to the Government departments. Only if there is a direct privity of contract between the foreign seller and the local purchaser, the sales could be said to be in the course of import and not otherwise. On the facts, the Supreme Court held that the sale by the assessee to the Government department did not occasion the import of the goods, but it was the purchase made by them from the foreign sellers which occasioned the import. The fact that under the contract the Director-General of Supplies and Disposals undertook to provide all facilities for the import of goods for fulfilling the contract including the import recommendation certificate did not make the sale to the Government departments in the course of import. The decision in *Khosla & Co. (P.) Ltd.* v. *Deputy Commissioner of Commercial Taxes, Madras Division*[1], was distinguished on the ground that there was only one sale, not that sale was the sale by Khosla & Co. (P.) Ltd., as agent of the manufacturer in Belgium. In a later decision in *Mod. Serajuddin* v. *State of Orissa*[2], the Supreme Court again had to consider the question and after a review of all these cases held that there should be a privity of contract between the exporter and the foreign purchaser in order to make it an export sale. That decision related to an export sale, the assessee in that case pleaded that the supplies made by him under a contract entered into with the State Trading Corporation for the sale of mineral ore was an export sale. The Supreme Court considered that there were two contracts, one by the assessee with the State Trading Corporation for the sale of mineral ore and the other by the Corporation in its turn with foreign buyers for the sale of the identical goods purchased by the Corporation from the assessee. In that case also, the assessee entered into negotiations with foreign buyers and settled all the conditions of the contract. The State Trading Corporation thereafter entered into a f.o.b. contract with the assessee and with the foreign buyers on identical terms. This procedure was followed because the commodity could not be exported directly by the assessee in view of the restrictions imposed by law. In spite of all these facts, the Supreme Court held that the export was by the State Trading Corporation and that there were two transactions of sale and not one transaction of export sale alone. These two latter decisions are therefore authorities for holding that the mere fact that the sale was for export, or the import was for the purpose of fulfilling a prior contract will not make it by itself a sale in the course of export or import. A privity of contract between the foreign buyer and the exporter or the importer and a foreign seller is necessary in order to make that transaction one in the course of export or import. It is also immaterial that the local purchaser had helped the importer in the import of the goods by finding out the foreign seller or assisting him in the placing of orders or clearing the goods from the port. What is material is a privity of contract between the ultimate purchaser and the foreign seller in order to make that transaction a sale in the course of import. We have also the same view in our decision reported in *State of Tamil Nadu* v. *Visweswara Das Gokuldas*[1].

5. Now coming to the facts of this case, it may be seen that the import licence was in the name of the assessees and the licence could not be transferred. The agreement between the assessees and the purchasers only made the purchasers obliged to help the assessees in importing the goods by paying the premium or part of the price in advance and taking all steps required for importing the goods within the time prescribed. In fact, the contract with the foreign seller was only by the assessees and the order is placed only in the name of the assessee alone and the import was also effected in the name of the assessees. If the purchasers were holding the import licence and the assessees had helped them in importing the goods as in the case of *Deputy Commissioner of Agricultural Income-tax and Sales tax* v. *Kotak & Co.*[2], the position would have been different. But, in this case, the licenced importer is the assessees and the purchasers had no right to import and therefore could

1. (1966) 2 S.C.J. 703 : 17 S.T.C. 473.
2. (1975) 2 S.C.C. 47 : 36 S.T.C. 136.

1. (1975) 36 S.T.C. 479.
2. (1973) 32 S.T.C. 6.

not have placed an order with the foreign seller. We are therefore of the view that there was a sale by the assessees to the purchasers M/s. Radha Dyeing Factory in respect of these transactions which were liable to tax under the Tamil Nadu General Sales Tax Act. We accordingly confirm the order of the Tribunal which is the subject-matter of revision in T.C. Nos. 461 to 465 of 1970, and set aside the order of theTribunal which is the subject-matter in T.C. No. 52 of 1972.

6. It is stated by the learned counsel for the assessees that in respect of assessment year 1962-63, which is the subject-matter of T.C. No. 52 of 1962, certain goods have been received at the port at Bombay and that is included in the turnover of Rs. 1,32,000 which was in dispute in that year. That question had not been gone into by the Tribunal. Accordingly, we set aside the order of the Tribunal and remand the matter to it to decide the question as to which part of the turnover was imported in the port of Madras and which part in the port of Bombay and whether any part of the turnover related to sales outside the State.

7. In the result, T.C. Nos. 461 to 465 of 1970 are dismissed. T.C. No. 52 of 1972 is allowed and the order of the Tribunal is set aside and that matter is remanded to the Madras Tribunal for deciding the question mentioned above. The department will be entitled to costs in all these petitions. Counsel fee Rs. 150 in each.

S.J. *T.C. Nos.* 461 *to* 465 *of* 1970 *dismissed;* *T.C. No.* 52 *of* 1972 *allowed.*

1. (1973) 32 S.T.C. 6.

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, CJ., S. Natarajan and V. Sethuraman, JJ.*

Chandrasekaran .. *Appellant**

v.

Kunju Vanniar and others .. *Respondents.*

Tamil Nadu Cultivating Tenants Protection Act (*XXV of* 1955), *sections* 2 (aa) *and* 3—*Usufructuary mortgage—Land leased by usufructuary mortgagee—Mortgage redeemed—Suit by mortgagor for possession and mesne profits—Tenant's claim of statutory protection—Valid.*

The question referred to the Full Bench was "whether the tenants under a usufructuary mortgage are entitled, after redemption of the usufructuary mortgage, to claim the protection granted under the Tamil Nadu Cultivating Tenants Protection Act, 1955, as against the mortgagor. In answering the question in the affirmative,

Held : There is no question of the usufructuary mortgagee conferring upon the tenant a higher title than what he is possessed of. What happens for purposes of the inclusive definition (of 'cultivating tenant') is that no higher title than what the usufructuary mortgagee possessed is conferred on the cultivating tenant. But the statute intervenes at the determination of the tenancy agreement and enjoins that if the contractual tenant within the meaning of the first part of the definition of 'cultivating tenant' continues in possession of the land, he would be entitled to protection as a cultivating tenant. The principle that no man can confer upon another a title or right higher than what he himself possessed, will, therefore, have no validity in the application of the inclusive definition of 'cultivating tenant'. [*Para.* 40.]

The position of a usufructuary mortgagee is not different from that of a lessee who

*L.P.A. No. 10 of 1972. 31*st October,* 1974.

sub-lets, because in either case the tenancy results from a valid agreement and after its termination the tenant continuing in possession becomes entitled to the statutory protection. [*Para.* 41.]

Cases referred to:

Prabhu v. *Ramdeo*, (1967) 1 S.C.J. 60: (1966) 3 S.C.R. 676 : A.I.R. 1966 S.C. 1721 ; *All India Film Corporation* v. *Sri Raja Gyannath*, (1970) 2 S.C.R. 581 ; *Seshammal Parasram* v. *Ratnabai*, (1973) 3 S.C.C. 198: A.I.R. 1972 S.C. 637 ; *Mahabir Gope* v. *Harbans Narain*, 1952 S.C.J. 292 : 1952 S.C.R. 775: A.I.R. 1952 S.C. 205 ; *Harshara Prasad* v. *Deonarain Prasad*, 1956 S.C.J. 279 : 1956 S.C.R. 1 : A.I.R. 1956 S.C. 305 ; *Asaram* v. *Ramkali*, 1958 S.C.J. 57o : (1958) 2 M.L.J. (S.C.) 32 : (1958) 2 An.W.R. (S.C.) 32 : 1958 S.C.R. 986 : A.I.R. 1958 S.C. 183 ; *Ganapathi* v. *Ayyakannu*, I.L.R. (1961) Mad. 452 : 74 L.W. 117 ; *Ramaswami Naidu* v. *Marudaveera Moopan*, (1959) 1 M.L.J. 25 : (1959) M.W.N. 30.

Appeal under clause 15 of the Letters Patent against the judgment and decree of Ramanujam, J., dated 5th August, 1971 in S.A. No. 930 of 1968 etc.

R. Vijayan and *A. Venkatachalam*, for Appellant.

The Advocate-General and *T. R. Rajagopalan*, for Respondents.

M. S. Venkatarama Iyer, amicus curiae.

Order of Reference to the Full Bench by Kailasam and Maharajan, JJ. (dated 23rd August, 1974).

Kailasam, J.—The plaintiff is the appellant in this Letters Patent Appeal. As a mortgagor, he filed O.P. No. 18 of 1964 and deposited the amount due under a usufructuary mortgage and prayed for redemption under section 83 of the Transfer of Property Act. The usufructuary mortgage was originally executed by one Ramachandra Iyer, the original owner of the suit property under Exhibit A-2, dated 2nd March, 1924, in favour of one Kauvery Achi. Ramachandra Iyer later sold the suit property to the father of the plaintiff under Exhibit A-1, dated 18th December, 1929. Defendants 1 and 2, who succeeded to the interest of the usufructuary mortgagee under a will executed by Kauveri Achi on 30th September, 1942, did not resist the suit for redemption, but consented to a decree for redemption. Defendants 3 and 4, who were in possession as tenants inducted by the usufructuary mortgagee, resisted the suit on the ground that they were entitled to the benefits of the Tamil Nadu Cultivating Tenants Protection Act. The third defendant claimed to be cultivating the property under Kauveri Achi by a registered lease deed till her death, and then, under defendants 1 and 2. There is no dispute that defendants 3 and 4 were tenants under the usufructuary mortgagee.

2. The trial Court decreed the suit holding that the plaintiff was entitled to recover possession from defendants 3 and 4. On appeal, the first appellate Court confirmed the finding of the trial Court holding that after redemption of the usufructuary mortgage by the mortgagor, it is not open to the defendants 3 and 4 to claim any rights as cultivating tenants. On a second appeal preferred by defendants 3 and 4 (tenants), Ramanujam, J., held that in view of the decision of the Supreme Court in *Prabhu* v. *Ramdeo*[1], the tenant under the usufructuary mortgagee can acquire rights and is entitled to protection under the Tamil Nadu Cultivating Tenants Protection Act, and found against the mortgagor, who subsequently redeemed the mortgage. The plaintiff mortgagor has preferred this Letters Patent Appeal.

3. The question that arises for consideration is, whether the tenants under the usufructuary mortgagee are entitled to the rights of a cultivating tenant under the Tamil Nadu Cultivating Tenants Protection Act as against the mortgagor also.

4. In order to answer this question, it is necessary to consider the rights of a tenant under the usufructuary mortgagee as against the mortgagor, who subsequently redeemed the mortgage under the general law and to decide whether the rights under the general

1. (1967) 1 S.C.J. 60: (1966) 3 S.C.R. 676 : A.I.R. 1965 S.C. 1721.

law has been in any way altered by the special legislation.

5. It is well established that no person can confer on another a better title than he himself has. The usufructuary mortgagee's interest lasts only as long as the mortgage has not been paid off. Therefore, on redemption of the mortgage, the title of the mortgagee comes to an end, and the rights of any person, who derived title such as a lessee, would also come to an end, and with the expiry of the mortgagee's title, when the interest of the mortgagee as a lessor is determined, the right of the lessee under him also terminates, and under the general law, the lessee's interest cannot subsist beyond the mortgagor's interest. The Courts have recognised one exception to this rule under section 76 (a) of the Transfer of Property Act, and that is, when the mortgagee takes possession of the mortgaged property and manages it as a person of ordinary prudence and leases the property, the lessee may be entitled to continue in possession even after the termination of title of the mortgagee in possession. This principle is applicable to agricultural lands.

6. This exception in the case of agricultural lands is stated by the Supreme Court in *All India Film Corporation* v. *Sri Raja Gyannath*[1], in the following terms:

> ".... acts done *bona fide* and prudently in the ordinary course of management, may bind even after the termination of the title of the mortgagee in possession. This principle applies ordinarily to the management of agricultural land and has seldom been extended to urban property so as to tie it up in the hands of lessee or to confer on them rights under special statutes. To this again, there is an exception. The lease will continue to bind the mortgagor or persons deriving interest from him if the mortgagor had concurred to grant it."

On the facts of that case, the Court found that it was a long lease on a small rent, and, therefore, it could not be deemed to be a *bona fide* act of prudence. In *Seshammal Parasram* v. *Ratnabai*[2], the exception regarding agricultural lands was reiterated. It is, therefore, necessary to consider what is the scope of the exception regarding the agricultural lands in leases granted by mortgagee in possession so as to bind the mortgagor, who redeems the mortgage subsequently.

7. In *Mahabir Gope* v. *Harbans Narain*[1], it was held that the mortgagee may grant leases not extending beyond the period of the mortgage, and any leases granted by him must come to an end on redemption, and that a mortgagee cannot during the subsistence of the mortgage act in a manner detrimental to the mortgagor's interests, such as by giving a lease which may enable the tenant to acquire permanent or occupancy rights in the land, thereby defeating the mortgagor's right to *khas* possession. Exception to this rule was recognised, and the Court stated that a permissible settlement by a mortgagee in possession with a tenant in the course of prudent management and the springing up of rights in the tenant conferred or created by statute based on the nature of the land and possession for the requisite period is a different matter altogether, and it is an exception to the general rule; in such a case the tenant cannot be ejected by the mortgagor even after the redemption of the mortgage and he may become an occupancy ryot in some cases and a non-occupancy ryot in other cases. This exception will not apply in a case where the terms of the mortgage prohibit the mortgagee from making any settlement of tenant on the land either expressly or by necessary implication. The case of the Supreme Court referred to above related to lands under Zamindari. The Court observed:

> "Where all the 'Zamindari rights are given to the mortgagee, it may be possible to infer on the proper construction of the document that he can settle lands with tenants in the ordinary course of management and the tenants might acquire certain rights in the land in their capacity as tenants".

But, the terms of the document in that case prohibited the mortgagee from

1. (1970) 2 S.C.R. 581 at 585.
2. (1973) 3 S.C.C. 198 : A.I.R. 1972 S.C. 637.

1. 1952 S.C.J. 292 : 1952 S.C.R. 775 : A.I.R. 1952 S.C. 205.

locating the tenants on the lands mortgaged. In the circumstances, the Court held that the person on whom the property was settled could not claim any right as a ryot under the statute or that he was entitled to occupancy rights.

8. In *Harshara Prasad* v. *Deonarain Prasad*[1], the case arose out of the Bihar Tenancy Act and it was contended that the mortgagees had the power under section 76 of the Transfer of Property Act, to induct tenants on the land for purposes of cultivation, that such a transaction would be binding on the mortgagors, and that its effect would be to confer on the tenants the status of ryots and that they would get occupancy rights under section 21 of the Act. The Court held that if the lease is one which could have been made by the owner in the course of prudent management, it would be binding on the mortgagors, notwithstanding that the mortgage has been redeemed and even in such a case, the operation of the lease cannot extend beyond the period for which it was granted. The Court further held that even assuming that the mortgagees had the power under section 76 (*a*) of the Transfer of Property Act, to continue to lease as tenants on the lands after the termination of the period fixed therein, that would confer on them at best the status of tenants from year to year, and not give them the right to continue in possession after the termination of the agricultural year during which the redemption takes place. It was ruled that the power of the mortgagee to induct tenants in the usual course of management would not avail the tenants to claim occupancy rights over the lands.

9. In *Asaram* v. *Ramkali*[2], the Supreme Court held that where the lands over which the lease was created were home-farm lands under the direct cultivation of the proprietors, as distinguished from lands which were under cultivation by tenants, having regard to the special rights which the tenancy laws all over India have recognised in the owner in respect of such lands, an act of the mortgagee which puts those rights in peril cannot be regarded as that of a prudent owner, and it requires exceptional ground to justify it.

10. In *Prabhu* v. *Ramdeo*[1], the Supreme Court held that persons inducted into agricultural land as tenants by an usufructuary mortgagee and who have become entitled to rights of khatedar tenants by virtue of section 15 of Rajasthan Tenancy Act, cannot be ejected by the mortgagor on the ground that the mortgage of land has been redeemed. Section 15 of the Rajasthan Tenancy Act, provides that subject to the provisions of section 16 every person who, at the commencement of the Act, is a tenant of land, shall, subject further to any contract not contrary to section 4 be entitled to all the rights conferred and be subject to all the liabilities imposed on khatedar tenants under the Act. In other words, the Court stated that as soon as section 15 came into operation on 15th October, 1955, the possession of the tenants who had been inducted into the land by the mortgagee was substantially altered, and they became khatedars by virtue of the statutory provisions prescribed by section 15. The Court pointed out that the decision in *Mahabir Gope* v. *Harbans Narain Singh*[2], that as a general rule a person cannot, by transfer or otherwise, confer a better title on another than he himself has, is subject to the rights of the tenants inducted by the mortgagee being conceivably improved by virtue of the statutory provisions which may meanwhile come into operation, and that had happened in the case under consideration by the Supreme Court. The Court also referred to the decision in *Harihar Prasad Singh* v. *Deonarain Prasad*[3], and held that under the Bihar Tenancy Act, no statutory benefit had been conferred on the tenants.

11. Summing up the effect of the decisions of the Supreme Court above refer-

1. 1956 S.C.J. 279: A.I.R. 1956 S.C. 305.
2. 1958 S.C.J. 575: 1958 S.C.R. 986: (1958) 2 M.L.J. (S.C.) 32: (1958) 2 An.W.R. (S.C.) 32: A.I.R. 1958 S.C. 183.

1. (1967) 1 S.C.J. 60: (1969) 3 S.C.R. 676: A.I.R. 1966 S.C. 1721.
2. 1952 S.C.J. 292: A.I.R. 1952 S.C. 205.
3. 1956 S.C.J. 279: A.I.R. 1956 S.C. 305.

red to, it is clear that normally no person can confer a better title on another than he possesses. But, under section 76 (*a*) of the Transfer of Property Act, the usufructuary mortgagee has a right to manage the property during the subsistence of the mortgage, and if in the course of such management grants leases, the leases should normally terminate with the rights of the usufructuary mortgagee. Any lease granted while the tenancy laws were in contemplation, which would result in the mortgagee being deprived of his khas possession on redemption cannot be considered to be a prudent act. If there is any clause in the mortgage prohibiting the leasing of the property, any lease conferred contrary to such terms of the usufructuary mortgage cannot confer any right on the tenant so inducted. If the lease granted by the mortgagee is a prudent one, it would bind the mortgagor even after redemption for the period for which the lease was granted. The right of such tenants may be improved by statutory provisions as in the case in *Prabhu* v. *Ramdeo*[1], by specific provisions in the enactment.

12. On the basis of the abovesaid decision, if we examine the present case, it appears from the findings of the Courts below that the lease by the mortgagees was from 1957, that is, after the present Act came into force.

13. The trial Court found accepting Exhibits B-15 and B-16, that the third defendant was in possession of the suit item as a lessee under the second defendant prior to the date of the order, Exhibit A-3, dated 19th June, 1964. It has also found that Exhibit B-1 revealed that in 1957 the fourth defendant was cultivating some of the suit items under the first defendant. Though the trial Court did not give a specific finding as to whether the lessees were in possession as tenants under the usufructuary mortgagee before 1957, the recorded finding would indicate that the third and the fourth defendants were in possession from 1957. The first appellate Court found that none of the allegations in the written statement filed by the tenants would show that the tenants were in possession of the property from 1957; and even with reference to the third defendant, who cultivates 2.12 acres, that is items 3 to 6, it is only from 23rd March, 1957 as seen from Exhibit B-10, the lease deed executed by the third defendant in favour of the second defendant. Regarding the fourth defendant, the Court found that the lease deed in his favour is Exhibit B-1, dated 21st May, 1957. The first appellate Court concluded by holding that it is needless to point with reference to the lease of any one whether such a lease is to be accepted, that it is not a prudent act especially after the tenancy laws wherein a specific right is given in these statutes to these tenants.

14. Accepting the findings of the first appellate Court, which was not challenged either before the second appellate Court or before us, we find that the leases were after the Act came into force and as such according to the decisions of the Supreme Court, the lease will have to be considered as imprudent, as it would result in the mortgagor being deprived of his right to obtain khas possession.

15. The result would be that defendants 3 and 4 would not be entitled to claim any right under section 76 (*a*) of the Transfer of Property Act and claim that their rights were enlarged under the Act.

16. The important question that arises for consideration is, whether the Tamil Nadu Cultivating Tenants' Protection Act, has altered the position in favour of the tenant of the usufructuary mortgagee conferring on him the rights of a cultivating tenant under the Act. Before examining the provisions of the Act, three decisions of the Supreme Court bearing on this point have to be closely examined. The latest decision of the Supreme Court is *Seshammal Parasram* v. *Ratnabai*[1]. As this decision proceeds on the basis that the question has been concluded by the decision of the Supreme Court in *All India Film Corporation* v. *Raja Gyannath*[2]; that decision will be referred to in detail.

1. (1967) 1 S.C.J. 60: A.I.R. 1966 S.C. 1721.

1. (1973) 3 S.C.C. 198: A.I.R. 1972 S.C. 637.
2. (1970) 2 S.C.R. 581.

17. The question which arose there was as to whether a tenancy created by the mortgagee in possession survives on the termination of the mortgagee's interest. It was held that the East Punjab Urban Rent Restriction Act, 1949, was not applicable to the facts of the case therein. The facts of the case are: The mortgagee of property in which a cinema was run, leased it to the first appellant on a monthly rental of Rs. 250, for a period of five years renewable for ten years by yearly renewals on the same terms. The lessee was given the full right to use the property whether by itself or through agents or in partnership or by sub-leasing. The lessee sublet the premises after equipping the house with cinema machinery on a monthly rental of Rs. 1,250. The property was declared evacuee property, and the lessee applied under the Evacuee Interest (Separation) Act (1951), for separation of interest, and the Competent Officer ordered sale of the property which was purchased for Rs. 65,000 by the respondent. The respondent therein filed a suit against the head-lessee and the sub-lessee for possession of the property, before the expiry of the term of lease.

18. It is not in dispute that the mortgagee leased the property after the East Punjab Urban Rent Restriction Act, 1949, came into force. The relevant provisions of the East Punjab Urban Rent Restriction Act, 1949, may be extracted:

The landlord is defined under section 2 (*c*) of the Act as follows:—

> "'Landlord' means any person for the time being entitled to receive rent in respect of any building or rented land whether on his own account or on behalf or for the benefit of any other person, or as a trustee, guardian, receiver, executor, or administrator for any other person, and includes a tenant who sublets any building or rented land in the manner hereinafter authorised and every person from time to time deriving title under a landlord."

and the 'tenant' is defined in section 2 (*i*) of the Act, which is as follows:—

> "'Tenant' means any person by whom or on whose account rent is payable for a building or rented land and includes a tenant continuing in possession after the termination of the tenancy in his favour, but does not include a person placed in occupation of a building or rented land by its tenant, unless with the consent in writing of the landlord or a person to whom the collection of rent or fees in a public market, car-stand or slaughter house or of rents for shops has been farmed out or leased by a municipal town or notified area committee".

19. The definition of the words 'landlord' and 'tenant' are wide enough to include the usufructuary mortgagee as well as the lessee under him. Section 13 which relates to eviction of tenants provides that a tenant in possession of a building shall not be evicted otherwise than under the provisions of the Act. Though the definitions of the words 'landlord' and 'tenant' and the provision relating to eviction would include a tenant under the usufructuary mortgagee, the Court was of the opinion that that status of landlord and tenant would not continue when the mortgagee's rights come to an end. The Court stated the law thus:

> "The answer to this question depends upon whether we can say that there was a tenancy to protect. We have shown above that the lease came to an end with the mortgagee's interest in the property.... The interest of of the mortgagor and the mortgagee united in the person of the purchaser and the mortgage ceased to subsist. In this view of the matter, the purchaser could claim that the mortgagee's action came to an end and there did not subsist any relationship between him and the tenants."

It is clear, therefore, that the mortgagor can state that there was no relationship between him and the tenants. It was contended before the Court that the East Punjab Urban Rent Restriction Act, defined 'landlord', with reference to the payment of rent, as a person entitled to receive the rent, and 'tenant'

as a person by whom rent is payable, and that the benefits of the Act would be applicable to the mortgagee, and his tenant would be a tenant under the definition of the Act. The Court held that these definitions apply, if the tenancy, either real, or statutory could be said to survive after the termination of the mortgage. In conclusion, the Court stated that the termination of the mortgagee's interest terminated the relationship of landlord and tenant, and it could not, in the circumstances, be said to run with the land and there being no landlord and no tenant, the provisions of the Rent Restriction Act could not apply any further. This decision was approved in a later decision of the Supreme Court in *Seshammal Parasram* v. *Ratnabai*[1]. The case arose under M. P. Accommodation Control Act. The tenancy in the case was created by the mortgagee in possession. It was contended that the mortgagee in possession had the right to let the premises in dispute under section 76 of the Transfer of Property Act and this act of letting the premises was an act of prudent management and binding on the mortgagor, who subsequently, redeemed the property. After stating that the decision in *All India Film Corporation* v. *Raja Gyannath*[2], concluded the matter, and proved that the definitions of the words 'tenant' and 'landlord' in Madhya Pradesh Accommodation Control Act, 1961, were similar to that of the East Punjab Rent Restriction Act, 1949, the Supreme Court held that the observation in *All India Film Corporation Ltd.* v. *Gyannath*[2], would be equally applicable to the facts of that case.

20. In the light of the law laid down by the Supreme Court in *All India Film Corporation Ltd.* v. *Gyannath*[2], the effect of the Tamil Nadu Cultivating Tenants Protection Act with which we are now concerned will have to be examined. The Supreme Court has stated that even when the definitions of landlord and tenant are applicable, the tenancy cannot be said to survive after the termination of the mortgage and the termination of the mortgagee's interest terminated the relationship of landlord and tenant which could not be said to run with the land and there being no landlord and no tenant, the provisions of the Rent Restriction Act could not apply any further.

21. Having held that under the general law the lease granted by the usufructuary mortgagee did not continue and the redeeming mortgagor is not bound by the lease, I will now proceed to consider whether the Tamil Nadu Cultivating Tenants Protection Act has enlarged the rights of the tenants of the mortgagee so as to bind the mortgagor.

22. The Tamil Nadu Cultivating Tenants Protection Act (XXV of 1955), was enacted with the object of giving protection from unjust eviction of cultivating tenants in certain areas in the State of Tamil Nadu. The Preamble runs as follows :—

> "Whereas it is necessary to protect cultivating tenants in certain areas in the State of Madras from unjust eviction."

'Cultivating tenant' is defined under section 2 (*a*) as follows :—

> "Cultivating tenant in relation to any land means a person who carries on personal cultivation on such land under a tenancy agreement, express or implied, and includes—(*i*) any such person who continues in possession of the land after the determination of the tenancy agreement, and (*ii*) the heirs of such person, but does not include a mere intermediary or his heirs."

From the definition it would be seen that any person who carries on cultivation under a tenancy agreement, express or implied, will be a cultivating tenant. It also includes a person who continues in possession after the determination of the tenancy agreement and the heirs of such person. The definition contemplates the relationship of landlord and tenant between the tenant and a person with whom he has entered into a tenancy agreement express or implied. This would support the view that the relationship of the tenant and landlord

1. (1973) 3 S.C.C. 198 : A.I.R. 1972 S.C. 637.
2. (1970) 2 S.C.R. 581.

continues between the two contracting parties alone that is, the tenant and the usufructuary mortgagee, his landlord, and would not subsist when the mortgage is extinguished for the mortgagor cannot be said to have entered into an express or implied contract or succeed to the rights of the usufructuary mortgagee. The words 'a person who continues in possession after the determination of the tenancy agreement' is ambiguous, for determination of the tenancy agreement may either refer to a tenant holding over under the usufructuary mortgagee or a case where the usufructuary mortgagee's rights had been determined. As the intent is not clear, it cannot be said that the Act has specifically conferred a right on the cultivating tenant even after the mortgage had been extinguished so as to bind the redeeming mortgagor.

23. The term landlord has been defined as follows:—

> "'Landlord' in relation to a holding or part thereof means the person entitled to evict the cultivating tenant from such holding or part."

The definition in the context would refer to the usufructuary mortgagee as the person with whom the tenant had entered into an express or implied contract and is entitled to evict the cultivating tenant from the holding. The definition would not necessarily include the mortgagor, for, so long as he does not recognise the tenancy and so long as the tenancy did not bind the mortgagor, he would not be entitled to evict the cultivating tenant, though he would have other remedies to obtain possession from the usufructuary mortgagee's tenants. While, therefore, there can be no doubt that the two definitions of "cultivating tenant" and 'landlord' would be applicable to the tenant and the usufructuary mortgagee, there is nothing that could bring the redeeming mortgagor within the definition of the word 'landlord'. Section 3 of the Act runs as follows:—

> "3. (1) Subject to the next succeeding sub-section, no cultivating tenant shall be evicted from his holding or any part thereof by or at the instance of his landlord, whether in execution of a decree or order of a Court or otherwise."

The words '*by or at the instance of his landlord*' would indicate that section 3 in particular, and the Act in general, were intended only to apply to his landlord, that is, the person with whom the tenant had entered into express or implied contract and the persons who claim title under such landlord. The amended section 6-A of the Act is in general terms, and bars a suit before any Court for possession or injunction in relation to any land where the defendant is a cultivating tenant entitled to the benefits of the Act. Though the suit against all cultivating tenants is barred, in the context it would refer only to a suit against defendants, who are treated as cultivating tenants and would not be applicable to persons who claim possession not as landlord.

24. An examination of the Act would thus disclose that there has been no express or implied enlargement of the rights of the tenant under a usufructuary mortgagee so as to bind the mortgagor.

25. It was urged that the decision of the Supreme Court in *All India Film Corporation Ltd.* v. *Gyannath*[1], was rendered without making any reference to *Prabhu* v. *Ramdeo*[2], and the law laid down by the Supreme Court in *All India Film Corporation Ltd.* v. *Gyannath*[1], is not in conformity with the decision in *Prabhu* v. *Ramdeo*[2]. I do not feel that there is any irreconcilable inconsistency between the principles laid down by the two decisions. In the case second cited before the Supreme Court, one Jore executed a usufructuary mortgage in about 1936 for a period of 20 years in favour of one, Ganga Din. After the expiry of the period prescribed by the said mortgage Jore's son, the appellant before the Supreme Court, obtained a decree for redemption on 16th July, 1956. During the continuance of the mortgage, the mortgagee Ganga Din, had let out the property to respondents 1 to 3 therein. Before the mortgage was redeemed and during the continu-

1. (1970) 2 S.C.R. 581.
2. (1967) 1 S.C.J. 60 : (1966) 3 S.C.R. 676 : A.I.R. 1966 S.C. 1721.

ance of the lease, the Rajasthan Tenancy Act, 1955, came into force on 15th October, 1955. The question arose whether the tenants, who were inducted by the usufructuary mortgagee could be ejected by the appellant on the ground that the mortgage in question had been redeemed. It may be noted that in this case, the lease was before the Rajasthan Tenancy Act came into force. After referring to the decision of the Supreme Court in *Mahabir Gope v. Harbans Narain Singh*[1], wherein it was laid down that a mortgagee cannot, during the subsistence of the mortgage, act in a manner detrimental to the mortgagor's interest, such as by giving a lease which may enable the tenant to acquire permanent or occupancy rights in the fields thereby defeating the mortgagor's right to khas possession, the Court observed that those observations were made in relation to the obligations of the mortgagee and the mortgagor under the provisions of the Transfer of Property Act. The Supreme Court pointed out that the Court had taken the precaution to point out that even in regard to tenants inducted into the land by a mortgagee, cases may arise where the said tenants may acquire rights of special character by virtue of statutory provisions which may, in the meanwhile, come into operation, and added that a permissible settlement by a mortgagee in possession with a tenant in the course of prudent management and the springing up of rights in the tenant conferred or created by statute based on the nature of the land and possession for the requisite period, was a different matter altogether. Explaining the observations, the Court stated that while dealing with the normal position under the Transfer of Property Act, the rights of the tenants inducted by the mortgagee may conceivably be improved by virtue of statutory provisions which may meanwhile, come into operation. The effect of the above passages is that normally the usufruoturary mortgagee cannot confer a better title on the tenant than what he has, and that the rights of the tenant are extinguished with the expiry of the mortgage. But, if the usufructuary mortgagee, in the course of prudent management leases the property, the tenant may get certain rights and the possession of the tenant inducted by the mortgagee may be protected during the period for which the lease was granted. It is open to the legislature to enlarge the rights of the tenants inducted by the mortgagee by statutory provisions. The question as to whether the rights of the tenants had been enlarged or not will depend upon the provisions of the statute. The Supreme Court considering the provisions of section 15 of the Rajasthan Tenancy Act, came to the conclusion that the tenant under the usufructuary mortgagee being a tenant satisfying the requirements of section 5 (43) of the Act, would be entitled to all the rights conferred and be subject to all liabilities imposed on khatedar under the Act, and as they become khatedar by virtue of the statutory provisions, and as under section 161 of the Act no tenant shall be ejected from his holding otherwise than in accordance with the provisions of the Act, the tenant thus inducted by the usufructuary mortgagee became entitled to the benefits of section 15 of the Act and cannot be ejected except under the provisions of the Act in view of section 161 of the Act. The decision is on the basis that the lease by the usufructuary mortgagee is a prudent act, the lease being before the Rajasthan Tenancy Act came into force, and on the basis that section 15 of the Act conferred on all tenants, who satisfy the requirements of section 5 (43), the rights of khatedar under section 15 of the Act. It will be seen that the Supreme Court was dealing with the case of a prudent lease by the usufructuary mortgagee where the lessee's rights had been enlarged by specific provisions of the enactment. When the lease is not prudent and when the right of the lessee has not been specifically enlarged by the statute, the decision will not apply. When the lease is not prudent, the decision of the Supreme Court in *All India Film Corporation* v. *Gyannath*[1], will be applicable. As there is no lease subsisting, and as there is no relationship of landlord and tenant between the mortgagor and the usufructuary mortgagee's lessee,

1. 1952 S.C.J. 292 : A.I.R. 1952 S.C. 205.

1. (1970) 2 S.C.R. 581.

the lessee cannot claim any enhanced right. But, if the lease is a prudent one and by statutory provisions his rights had been enlarged, then he could claim protection under the enactment concerned and this position is laid down by the Supreme Court in *Prabhu* v. *Ramdeo*[1]. Thus viewed there is no inconsistency between the two decisions. The case under consideration before me being one where there was no prudent lease by the usufructuary mortgagee, the decision in *All India Film Corporation Ltd.* v. *Gyannath*[2], would be aplicable, and the tenant cannot claim any enhanced right.

26. As conflicting views have been taken by several Judges of this Court, we gave notice to the Advocate-General and requested Mr. M. S. Venkatarama Iyer, a senior member of the Bar, to assist us as *amicus curiae*. We are indebted to both of them for their valuable assistance.

27. In the result, I would allow the appeal, but under the circumstances would not make any order as to costs.

Maharajan, *J.* — I have had the advantage of going through the judgment of my learned brother. With great respect to him, I find myself unable to concur with his conclusions.

29. The two questions that arise for determination in this appeal are:—

1. Whether the tenants under a usufructuary mortgagee are entitled after the discharge of the usufructuary mortgage, to claim the protection granted under the Tamil Nadu Cultivating Tenants Protection Act, 1955, as against the mortgagor?

2. If the tenants are so entitled to protection, whether the civil Court would have jurisdiction to try the suit, which is essentially one for recovery of possession of the leasehold from the tenants?

While upon the first question, I may hasten to agree that the lease granted by a usufructuary mortgagee would ordinarily be co-terminous with the usufructuary mortgage. It is a truism to say that a person cannot, by transfer or otherwise, confer on another a better title than he himself has, and that, consequently, a mortgagee cannot create an interest in the hypotheca in favour of a tenant which would enure beyond the termination of his own interest as a mortgagee. It is obvious that a lease granted by a usufructuary mortgagee would come to an end the moment the usufructuary mortgage itself has been redeemed. But, where before the usufructuary mortgage has been redeemed, the statute intervenes and confers upon the tenant of the mortgagee certain rights and privileges, the principle that the lease is co-terminous with the usufructuary mortgage would no longer hold good, because the statutory rights and privileges of the tenant are neither traceable to, nor derived from, the mortgagee, but have been conferred upon the tenant by statute. This proposition admits of no doubt, and has been laid down authoritatively by a Bench of 5 Judges of the Supreme Court in *Prabhu* v. *Ramdeo*[1]. What remains for the Court to consider is whether the Tamil Nadu Cultivating Tenants Protection Act has before the redemption of the mortgage, conferred any statutory protection upon the respondents, who were tenants of the usufructuary mortgagee.

30. The Act (Tamil Nadu Act XXV of 1955) came into force on 27th September, 1955. For some years before the Act was passed, there was considerable public discussion as to what kind of land reforms should be effected by legislation. These discussions created apprehensions in the minds of those who had leased out lands and they started evicting their tenants with a view to bring the lands under their personal cultivation. As such large-scale eviction might lead to agrarian trouble and disturbance the Legislature enacted the Tamil Nadu Cultivating Tenants Protection Act. The Statement of Objects and Reasons published in Part IV-A of the *Fort St. George Gazette* of 3rd August, 1955 at page 145, runs as follows:—

1. (1967) 1 S.C.J. 60: (1966) 3 S.C.R. 676: A.I.R. 1966 S.C. 1721.
2. (1970) 2 S.C.R. 581.

1. (1967) 1 S.C.J. 60: (1966) 3 S.C.R. 676; A.I.R. 1966 S.C. 1721.

"It has been brought to the notice of Government that in anticipation of land reforms legislation, owners of lands are evicting cultivating tenants with a view to bringing the lands under their personal cultivation. Such large-scale eviction will if allowed to continue, lead to agrarian trouble and disturbance and to breach of peace. The object of this Bill is to protect the tenants from unjust eviction for a period of one year. The tenant will not, however, be entitled to protection if he is in arrear of rent or has done any act which is destructive of or injurious to the land or any crop thereon, or has ceased to cultivate the land or has used it for any purpose other than that for which it was let. Suitable provision has been made for restoring land to any cultivating tenant who was in possession of it on the 1st December, 1954."

31. It would be apparent from the above statement that the legislative intent was to give protection to cultivating tenants regardless of the fact whether the tenants hold possession in pursuance of tenancy agreements with absolute owners or with any person, such as a life estate holder or a Receiver or usufructuary mortgagee entitled to evict the cultivating tenant from the holding. The main concern of the legislation was to protect all cultivating tenants from eviction and thereby prevent agrarian trouble, disturbance and breach of peace. There is no reason to suppose that the legislature intended to discriminate between different categories of cultivating tenants and, to give protection only to those cultivating tenants who derived possession from absolute owners and deny protection to cultivating tenants who derived possession from limited owners or usufructuary mortgagees. One would think that eviction of either category of cultivating tenants would have brought about agrarian trouble which it was the main purpose of the enactment to avert. It may be noticed that the Act makes serious inroads upon the rights of lessors and owners under the Transfer of Property Act and under the common law of India. The Court ought not, therefore, to construe the effect of this special enactment by grafting into it considerations imported from the Transfer of Property Act or the common law of India. In construing a statute the Court must look to the object to be accomplished, the evils and mischief sought to be remedied or the purpose to be subserved and place on it a reasonable or liberal construction, which would best effect its purpose rather than one which would defeat it (*vide*: Note 323, page 595 *Corpus Juris Secundum*, Vol. 82). Even if a statute is susceptible of more than one construction it must be given that which will best effect its purpose rather than one which would defeat it even though such construction is not within the strict literal interpretation of the statute and even though both constructions are equally reasonable. The legislative declaration of purpose and policy is entitled to gravest consideration unless overthrown by facts of record, and a statute will if possible be given a construction which is consistent with its declared purpose (*vide* : Note 323, *Corpus Juris Secundum*, cited *supra*, Vol. 82). Though the meaning of the relevant provisions of the Act will not be controlled or affected by anything in the preamble it is a well known rule of interpretation that in cases of doubt as to the proper construction of the body of a statute, resort may be had to the preamble or recitals for the purpose of ascertaining the legislative intent (*vide* : *Corpus Juris Secundum*, cited *supra*, Vol. 82, note 349, page 730).

32. The Preamble to the Tamil Nadu Cultivating Tenants Protection Act, 1955, runs as follows :—

"Whereas it is necessary to protect cultivating tenants in certain areas in the State of Madras from unjust eviction."

The Preamble seems to indicate that all categories of cultivating tenants would come under the protective umbrella of this Act. The definition of 'cultivating tenant.' in section 2 (*aa*) as amended by Tamil Nadu Act IX of 1969, is as follows :

"(*aa*) 'cultivating tenant' (*i*) means a person who contributes his own physical labour or that of any member of his family in the cultivation of any land belonging to another, under a tenancy agreement, express or implied ; and

> (*ii*) includes—(*a*) any such person who continues in possession of the land after the determination of the tenancy agreement ; (*b*) the heir of such persons, if the heir contributes his own physical labour or that of any member of his family in the cultivation of such land ; (*c*) a sub-tenant, if he contributes his own physical labour or that of any member of his family in the cultivation of such land ; or (*d*) any such sub-tenant who continues in possession of the land notwithstanding that the person who sublet the land to such sub-tenant ceases to have the right of possession of such land ; but (*iii*) does not include a mere intermediary or his heir."

It is noteworthy that in sub-clause (*i*) of clause (*aa*) to section 2, no reference is made to the person with whom the cultivating tenant should have entered into a tenancy agreement. In order to qualify as a cultivating tenant, it is sufficient if he is in possession of any land belonging to another in pursuance of a tenancy agreement with any person who is entitled for the time being to lease out the land to him. The definition of 'cultivating tenant' is so wide as to embrace even a sub-tenant between whom and the landlord there is no privity of estate. Sub-clause (*d*) of clause (*aa*) proceeds to make it clear that even a sub-tenant, who continues in possession of the land, notwithstanding that the person who sublet the land to such sub-tenant has ceased to have the right to possession of such land, would be a cultivating tenant within the meaning of the Act and entitled to protection thereunder. Under the general law and under the Transfer of Property Act, the tenure of a sub-tenant is analogous to and as precarious as that of a lessee from a usufructuary mortgagee and the sub-tenancy would terminate with the tenancy and the sub-tenant, who has no privity of contract with the landlord cannot maintain possession of the land as against the landlord after the head tenancy has terminated. But, this notion has been thrown overboard by the definition contained in the Act, which confers even upon such a sub-tenant protection from eviction. If 'A' the owner of a land, grants a lease in favour of 'B' for a period of one year and 'B' sub-leases the land to 'C' and the sub-tenant continues in possession of the land even after the expiry of one year, he would, under the definition, be entitled to protection under the Act; and he can successfully resist the suit by the landlord for eviction against him on the ground that he is a cultivating tenant, but the landlord cannot say that there is neither privity of contract nor privity of estate between him and the sub-tenant and that the sub-tenant cannot, therefore, continue in possession, because the head-tenant, who had sublet the land to the sub-tenant, had himself ceased to have the right to possession of such land. This part of the definition would appear to emphasise the view that all cultivating tenants would be entitled to protection of this statute regardless of the termination of their contractual right to possession, so long as they continue in cultivation of the land in pursuance of a tenancy agreement with the person entitled to lease the land. The usufructuary mortgagee is certainly a person who is entitled to be in possession of the hypotheca and to enjoy the usufruct thereof so long as the usufructuary mortgage is in full force. During this period he is entitled in law to lease out the hypotheca. It may be noted that the word 'landlord' has been defined in section 2, clause (*c*) of the Act so widely that it may take in not only an absolute owner of a holding, but also any person who may have an inferior interest in the holding but is nevertheless entitled to evict the cultivating tenant from such holding. The holder of a life interest in a holding or the holder of a usufructuary mortgagee therein would, notwithstanding his truncated rights, still be entitled to evict the cultivating tenant under the law, and would therefore, be qualified to be a landlord within the meaning of this Act. The definition of 'landlord' as 'a person entitled to evict a cultivating tenant from such holding' is designedly elastic so that it may include within its gamut all persons ranging from a person having absolute ownership in the holding down to a person like a usufructuary mortgagee, who, despite his precarious right to possession of the holding, would still be entitled to evict the cultivating tenant from the holding during the currency of the mortgage. The deliberate

wideness of this definition has a two-fold purpose. In the first place, it throws light on the kind of persons with whom the cultivating tenant can enter into a tenancy agreement within the meaning of section 2 (*aa*) of the Act. It need not necessarily be with the owner of the land. Reading the definition of 'cultivating tenant' in conjunction with the definition of 'landlord' it has to be held that the tenancy agreement contemplated in section 2 (*aa*) may be with any person entitled to evict the cultivating tenant, which means any person ranging from an absolute owner to a person like a usufructuary mortgagee who despite his rights being inferior to those of an absolute owner would still be entitled to possess the land by leasing it or otherwise. In the second place, the inclusive definition of the word 'landlord' would throw light upon the manner in which section 3 (1) of the Act should be interpreted. Section 3 (1) says—

"Subject to the next succeeding sub-section; no cultivating tenant shall be evicted from his holding or any part thereof, by or at the instance of his landlord, whether in execution of a decree or order of a Court or otherwise."

This provision makes it clear that notwithstanding the fact that a decree or order of a civil Court for eviction of the tenant has been passed before the coming into force of the Act, no cultivating tenant shall be evicted except in accordance with the other provisions contained in the Act. No doubt, the words 'by or at the instance of his landlord' occur in this section. We will be taking the words too literally, if we construe the same to mean that in the matter of eviction of the tenant, the statute imposes a disability solely and only upon the person with whom the tenant has entered into an express or implied tenancy agreement. It may be that the tenancy agreement is concluded with *A*, an absolute owner, but at the time the eviction suit is filed, *A* is dead, and his heir *B* has inherited the holding. It would not be open to *B* to contend that though the tenant cannot be evicted at the instance of 'his landlord' namely, *A*, there is no legal embargo against *B*, evicting him. Such a literal construction would kill the spirit of the enactment, besides leading to anomalous results; the principle of harmonious construction requires the Court to read the word 'landlord' in section 3 (1) in conjunction with the definition of the word 'landlord' in section 2 (*e*) of the Act, in which case, it would embrace all persons entitled to evict the cultivating tenant, such persons including not only the mortgagee who during the currency of the tenancy agreement, would be entitled to evict the cultivating tenant, but also the mortgagor, who after redeeming the mortgagee, has become entitled to evict the cultivating tenant. If section 3 (1) says that no cultivating tenant shall be evicted "by or at the instance of his landlord", it means that no cultivating tenant shall be evicted by or at the instance of any person entitled to evict him. To say that the tenant's landlord is only the mortgagee and not the mortgagor and that though the section interdicts the mortgagee from evicting the tenant, it does not interdict the mortgagor from evicting him, would be to put a construction upon the section, which besides being uncharitable to the draftsman, who had unfortunately to express himself in a foreign language, would have the effect of frustrating the very purpose of this special enactment. In my view, the expression 'his landlord' in section 3 (1) can be reasonably construed to mean not only the usufructuary mortgagee, who leased out the lands to the respondents, but also the appellant (mortgagor), who after redemption of the mortgage, has become entitled to evict the cultivating tenant in accordance with the provisions of this Act.

33. Further, section 6-A of the Act, which is less vulnerably drafted, says that if in any suit before any Court for possession of any land, it is proved by affidavits or otherwise that the defendant is a cultivating tenant entitled to the benefits of this Act, the Court shall not proceed with the trial of the suit, but shall transfer it to the Revenue Divisional Officer. There is no reference in this section to 'his landlord'. If it is proved that the defendants are cultivating tenants, entitled to the benefits of the Act, the Court shall refuse to proceed with the trial of the suit, which has been instituted for possession of

the land from the cultivating tenants and shall transfer it to the Revenue Divisional Officer who shall dispose it of as though it were an application under the Act. The embargo placed by section 6-A upon suit for possession is unqualified. Any suits for possession before any Court, instituted, whether it be by the mortgagee before redemption or after redemption by the mortgagor, shall be transferred by the civil Court to the Revenue Divisional Officer. This provision would also reinforce the conclusion that the Act is intended to protect all cultivating tenants against eviction either by the mortgagee or by the mortgagor. The object to be accomplished by the Act and the mischief sought to be remedied thereunder require the Court to place on it a reasonable and liberal construction, which would best accomplish its purpose rather than frustrate it. I am therefore, of the view that the respondents are cultivating tenants entitled to the benefits of the Tamil Nadu Cultivating Tenants Protection Act, that they had acquired statutory protection even before the suit usufructuary mortgage had been redeemed by the appellant, that for the purpose of the Act, the appellant is as much the landlord of the respondent as the usufructuary mortgagee who has been redeemed by the appellant and that the appellant is not entitled to evict the respondents except in conformity with the provisions embodied in, and the procedure laid down by the Tamil Nadu Cultivating Tenants Protection Act. Upon the first question, I agree with Ramanujam, J.

34. Upon the second question, I have to respectfully differ from the second appellate Judge, who has dismissed the suit of the appellant on the ground that the respondents are not liable to be evicted. If the respondents are cultivating tenants within the meaning of the Act and entitled to the benefits of the Act, as I hold them to be, the civil Court has no jurisdiction under section 6-A of the Act to proceed with the trial of the suit, but it shall transfer the suit to the Revenue Divisional Officer for disposal by him in accordance with the provisions of the Act. I would, therefore, while agreeing with Ramanujam, J., that the respondents are cultivating tenants entitled to the benefits of the Act, set aside the learned Judge's dismissal of the suit, and direct the suit to be transferred to the Revenue Divisional Officer concerned. Under the circumstances of this case, there will be no order as to costs.

Kailasam, J.—The question involved in this Letters Patent appeal is whether the tenants under a usufructuary mortgagee are entitled, after redemption of the usufructuary mortgage, to claim the protection granted under the Tamil Nadu Cultivating Tenants Protection Act, 1955, as against the mortgagor.

36. We consider this question is of considerable public importance, and it will have to be authoritatively decided finally. This question has arisen many times and different judges have taken different views. In order to finally settle the position of law, so far as this High Court is concerned, we are agreed that the matter should be decided by a Full Bench. Under Order I, proviso to rule 2 of the Rules of the High Court, Appellate Side, the matter will be posted before a Full Bench.

Pursuant to the Order of Reference aforesaid, this appeal coming on for hearing before the Full Bench, the Court delivered the following Judgment:

Veeraswami, C J.—The Letters Patent Appeal is posted before a Full Bench, because, Kailasam, J. and Maharajan, J., differed on the question whether the tenants under a usufructuary mortgagee are entitled, after redemption of the usufructuary mortgage, to claim protection under the Tamil Nadu Cultivating Tenants Protection Act, 1955, as against the mortgagor. The usufructuary mortgage was created on 2nd March, 1924. Respondents 1 and 2 were inducted into the land by the usufructuary mortgagee in 1957 as tenants. On 19th June, 1964, the mortgage was redeemed. The mortgagor-owner brought the suit for possession and mesne profits. The first two Courts agreed in decreeing the suit. But, in second appeal, Ramanujam, J., reversed the decree relying on *Prabhu* v.

Ramde[1], and dismissed the suit. But, he granted leave. In the Letters Patent Appeal, Kailasam, J., took the view that the respondents were not entitled to the statutory protection, while Maharajan, J., took the opposite view.

38. The Tamil Nadu Cultivating Tenants Protection Act, 1955, was enacted for the protection from eviction of cultivating tenants in certain areas in the State of Madras. It provided for statutory protection, eviction on certain grounds, right of tenant to restoration of possession in certain events and right of landlord to resume for personal cultivation. 'Cultivating tenant' is defined by section 2 (aa) in relation to any land as a person who carries on personal cultivation on such land under a tenancy agreement, express or implied. The definition also includes "any such person as is referred to in sub-clause (1) who continues in possession of the land after the determination of the tenancy agreement." By Act IX of 1969, an amendment was introduced bringing within the scope of definition of "cultivating tenant' a sub-tenant as well. This was done in view of certain earlier decisions of this Court, as for instance *Ganapathi* v. *Ayyakannu*[2]. A landlord is defined by the section in relation to a holding or part thereof as a person entitled to evict the cultivating tenant from such holding or part. 'Holding' under section 2 (a) means a parcel or parcels of land held by a cultivating tenant. 'Land' as defined means land used for the purpose of agriculture or horticulture, and it includes certain things with which we are not concerned in this case. A person is said to carry on personal cultivation on a land when he contributes his own physical labour or that of the members of his family in the cultivation of the land. The term 'cultivating tenant' would extend also to his heirs, but not to a mere intermediary or his heirs. The protection of a cultivating tenant is afforded by means of section 3 which is—

> "(I) Subject to the next succeeding sub-section, no cultivating tenant shall be evicted from his holding or any part thereof, by or at the instance of the landlord, whether in execution of a decree or order of a Court or otherwise."

Clauses (aa) to (d) in sub-section (2) of the section deals with the grounds for eviction. Clause (aa) is not apposite in this case. Clause (b) makes negligence, which is destructive of or injurious to the land or any crop thereon, a ground for eviction. If the cultivating tenant has altogether ceased to cultivate the land, that will also furnish the basis for eviction. Clause (c) would enable a landlord to evict a cultivating tenant, if he has used the land for any purpose not being agricultural or horticultural purpose. The next clause (d) deals with another ground for eviction, namely, wilful denial of the title of the landlord to the land. These are the relevant provisions in the light of which we have to answer the question set out at the outset.

39. It is noteworthy that the first part of the definition of 'cultivating tenant' envisages a tenancy agreement, express or implied. The agreement is a *sine qua non* to bring about a tenancy. But, in order to make the tenant a cultivating tenant, a further requisite is that he should carry on personal cultivation as defined which we have adverted to. When such a tenancy agreement comes to an end by whatever means, then the statutory tenancy begins by virtue of the inclusive definition of the term 'cultivating tenant'. Determination of a tenancy agreement necessarily means that the contractual relationship of landlord and tenant is brought to an end and notwithstanding only by reason of the fact that the cultivating tenant as defined in the first part of the definition continues in possession of the land he is enabled to continue to have the status of a cultivating tenant. In other words, the effect of the inclusive definition is that it brings about a statutory tenancy for purposes of protection. To bring about that result the precedents are that there should have been in the origin a tenancy agreement, express or implied, and under that agreement to which the person is a party he should carry on personal cultivation, on the land. If these premises are granted, though the agreement of tenancy express or implied has terminated but the person mentioned

1. (1967) 1 S.C.J. 60: (1966) 3 S.C.R. 676: A.I.R. 1966 S.C. 1721.
2. I.L.R. (1961) Mad. 452 : 74 L.W. 117.

in the first part of the definition continues in possession of the land he will be a cultivating tenant. The first part of the definition does not specify as between whom and whom, the tenancy agreement mentioned is contemplated. The lease may have been granted by the owner or a usufructuary mortgagee or even a lessee of the land. But, the person who carries on personal cultivation of the land should derive his right under a tenancy agreement, express or implied with a person entitled to enter into it who may be any one of those persons we have just now mentioned as instances. To attract the inclusive definition, the two requisites are determination of a tenancy agreement and the person who was within the first part of the definition continues in possession of the land. If those requisites are satisfied, the person continuing in possession of the land will be a cultivating tenant. The inclusive definition does not visualise that after the determination of tenancy if the person as defined in the first part of the definition continues in possession of the land, he would not be a cultivating tenant unless there is a contractual relationship, express or implied, with his landlord. We say so, because, a landlord, as noticed supra, is defined not in terms of a person who lets out the land, but as a person entitled to evict the cultivating tenant. No contractual relationship is necessary or is implied for purposes of the definition. The grounds of eviction which we enumerated above should be understood and related to a landlord as defined and not in terms of a landlord as contemplated by the Transfer of Property Act. Under the latter Act, a landlord necessarily implies contractual relationship, and there should be a landlord as well as a tenant, and, as between them, the basis of relationship should be the tenancy agreement. But that will be so only in respect of the first part of the definition of 'cultivating tenant'. When we take the inclusive definition, it deals with a case of a situation arising after determination of tenancy so that the contractual relationship need not exist as the basis for entitling the landlord either to collect rent or evict. Reading the definitions of 'cultivating tenant' and 'landlord' it is further clear that in order to be a cultivating tenant for an extended period, the lessor need not necessarily have the capacity or right to confer it. All that is essential for the inclusive definition to apply is that in the origin of the tenancy, it should have resulted from a tenancy agreement, express or implied, and for purposes of inclusive definition, it does not matter whether the original lessor is in the picture or not. The test to find out whether a person is a landlord is not that whether there is a direct agreement between him and the tenant but whether the person who claims to be the landlord is entitled to evict on the grounds mentioned in the Act. It is in the light of this position, in our opinion, we have to appreciate the scope and effect, of sub-section (1) of section 3. When it speaks of 'at the instance of his landlord', it means at the instance of the person entitled to evict the tenant. The word 'his' does not make any difference, for the person entitled to evict him will be his landlord at any given time. The same meaning to the 'landlord' has to be given in clauses (*b*), (*c*) and (*d*) as well of sub-section (2) of section 3.

40. On the construction, we have thus placed, it will be obvious that, even though the usufructuary mortgage on the strength of which the mortgagee let out to the tenant has been redeemed, since the tenancy originated in an agreement and since because of the redemption, such an agreement came to an end but the tenant continued to be in possession, he will squarely be within the inclusive definition of the term 'cultivating tenant'. On that view, the reasoning in *Ganapathi* v. *Ayyakannu*[1], does not appear to us to be correct. There is no question of the usufructuary mortgagee conferring upon the tenant a higher title than what he is possessed of. What happens for purposes of the inclusive definition is that no higher title than what the usufructuary mortgagee possessed is conferred on the cultivating tenant. But, the statute intervenes at the determination of the tenancy agreement and enjoins that if the contractual tenant within the meaning of the first part of the definition of 'cultivating tenant' continues in possession of the land, he would be entitled to protection

1. I.L.R. (1961) Mad. 452 : 74 L.W. 117.

as a cultivating tenant. A reference was made in that case in the observations of Balakrishna Ayyar, J. in *Ramaswami Naidu* v. *Marudaveera Moopan*[1]. Both *Ganapathi* v. *Ayyakannu*[2] and *Ramaswami Naidu* v. *Marudaveera Moopan*[1], deal with cases of sub-lessees. They were all of the view that sub-lessees were not within the inclusive definition. The reasoning of Balakrishna Ayyar, J., which Jagadisan, J. and Kailasam, J., accepted in *Ganapathi* v. *Ayyakannu*[2], was this :

> "A tenancy agreement means an agreement creating a tenancy, and when we speak of a tenancy we normally understand that there is on the one side a landlord and, on the other side, a tenant or lessee. In relation to sub-lessee we do not usually use the term tenancy agreement ; instead we speak of the assignee of a lease. It will also be appreciated that if the contention of Mr. Krishnaswami Iyer were right, it would be possible for a lessee to create rights larger than he himself has, and normally a construction which produces such a result should not be accepted..... The expression 'heirs, legal representatives and assignees' in a very familiar one. When, therefore, the Legislature said that the 'heirs of such person' shall be deemed to be tenant, but did not, at the same time, include his 'legal representatives or assignees' in that category the inference must be that it did not want to confer the benefit of the Act on the legal representatives or assignees of the original lessee. Otherwise, it will be hard to explain the omission of the words "legal representatives and assignees."

So far as the first part of the learned Judge's reasoning is concerned, we are in agreement because a tenancy necessarily implies a landlord on the one hand and a tenant on the other. But equally to a sub-lessee, the protection is traced to the statute. If the sub-lessee continues in possession, but the tenancy agreement originally entered into had not terminated, then the inclusive definition may not apply, and, therefore, the sub-lessee may not be entitled to protection. If, on the other hand, by the time the sub-lessee claims protection under the Act, the tenancy agreement with his lessor had terminated, then it will be a different matter to which the inclusive definition will have application. Also, the observation of the learned Judge that the lessor cannot confer higher title than he himself possessed misses the fact, if we may say so with respect, that the conferment of protection is not by any person under a contract but by force of the statutory provision. The principle that no man can confer upon another a title or right higher than what he himself possessed, will, therefore, have no validity in the application of the inclusive definition of 'cultivating tenant'.

41. For the appellant it was contended that, when by Amending Act IX of 1969, only a sub-tenant was brought within the vortex of the inclusive definition of 'cultivating tenant', it did not do so in respect of a tenant or a usufructuary mortgagee. But on principle, as we consider, the position of a usufructuary mortgagee is not different from that of a lessee who sub-lets, because in either case the tenancy results from a valid agreement and after its termination the tenant continuing in possession becomes entitled to the statutory protection.

42. In *Prabhu* v. *Ramdeo*[1], which was concerned with Rajasthan Tenancy Act, especially, sections 15, 161, 5 (43) and (44), it was held that the persons inducted into the agricultural land as tenants by the the usufructuary mortgagee and who had become entitled to rights of khatedar tenants by virtue of section 15 could not be ejected by the mortgagor on the ground that mortgage of the land had been redeemed. Rights of tenants inducted by the mortgagee in possession under the provisions of the Transfer of Property Act may conceivably be improved by statutory provisions which may meanwhile come into operation. Ramanujam, J., in the second appeal, has placed reliance on this decision for his view. But, we would prefer to rest our view on the construction that we have been inclined to make on the statutory provisions themselves in the Tamil Nadu Cultivating Tenants Protection Act, 1955.

1. (1959) 1 M.L.J. 25 : (1959) M.W.N. 30.
2. I.L.R. (1961) Mad. 452 : 74 L.W. 117.

1. (1967) 1 S.C.J. 60 : A.I.R. 1966 S.C. 1721.

43. Counsel for the appellant referred to *Sachalmal Parasram v. Ratanbai*[1], which we do not think in any way affects the view that we have taken as to the effect of the related statutory provisions in the Act. The Letters Patent Appeal fails, and it is dismissed. No costs.

44. Maharajan, J, in his opinion, has suggested that the matter will have to go back to the Revenue Divisional Officer. But, the suit out of which the appeal arises was one *simpliciter* for recovery of possession and mesne profits and not for eviction on any other grounds available to the plaintiff under the Tamil Nadu Cultivating Tenants Protection Act. There is, therefore, no point in forwarding the plaint to the Revenue Divisional Officer functioning under the Act. If the plaintiff wants to evict the defendants, he can always do so on grounds open to him in appropriate proceedings.

S.J. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail, J.*

G. Ponniah Thevar .. *Appellant**

v.

Nallayam Perumal Pillai and others .. *Respondents.*

(A) *Tamil Nadu Cultivating Tenants Protection Act (XXV of* 1955)—*Lessee from life estate-holder—Death of life estate-holder—Lessee cannot claim benefit of the Act.*

(B) *Transfer of Property Act (IV of* 1882), *section* 76 (a)—*Tenant under life estate-holder—Applicability of the Act.*

A tenant under a life estate-holder cannot claim the protection of the Cultivating Tenant's Protection Act as against the ultimate owners of the property on the determination of the life estate. [*Para.* 7.]

Section 76 (*a*) of the Transfer of Property Act will not apply to a tenancy created by a limited owner. Where the right claimed by the tenant is a specific right pursuant to a particular statutory provision, the question of applying the principles of section 76 (*a*) by way of analogy does not arise. [*Para.* 7.]

Cases referred to :

Mangalathachi v. *Kalyanasundaram Mudaliar*, (1966) 2 M.L.J. 66 ; *Chandrasekharan* v. *Kunju Vanniar and others*, (1975) 88 L.W. 216 : (1976) 2 M.L.J. 243 A.I.R. 1975 Mad. 227 : (F.B.).

Appeal against the decree of the Court of the Subordinate Judge of Dindigul in Appeal Suit No. 149 of 1970 preferred against the Decree of the District Munsif of Periyakulam in Original Suit No. 186 of 1969.

T. R. Mani and *S. Gopalaratnam,* for Appellant.

B. Ramamoorthy and *K. S. Rajagopalan,* for Respondents.

The Court delivered the following

JUDGMENT.—The first defendant in O.S. No. 186 of 1969 on the file of the Court of the District Munsif, Periyakulam, who lost before the Courts below, is the appellant herein.

2. The controversy lies within a very narrow compass. Admittedly, the suit property of an extent of 1 acre 75 cents belonged to one Annamalai Pillai under a settlement deed, the original of Exhibit A-2, dated 16th December, 1907 by his natural father Ramaswamy Pillai. After the death of Annamalai Pillai, leaving two widows, *viz.*, Unnamalai Ammal and Veerayee. Veerayee instituted O.S. No. 482 of 1927 on the file of the District Munsif's Court, Periyakulam for partition of the properties of Annamalai Pillai, impleading Unnamalai Ammal and the son of the natural brother of Annamalai Pillai, *viz.*, the second defendant in this suit. That suit ended in a compromise, as evidenced by Exhibit A-5, dated 6th July, 1935, being the certified copy of the final decree in I.A. No. 1009 of 1933 in O.S. No. 487 of 1927. Under the terms of the compromise, the extent of 1 acre 75 cents was to be enjoyed by Unnamalai Ammal during her life time, and the same was to belong absolutely to the sons of the second defendant herein. The plaintiffs in the suit are the sons of the second defendant. After the

1. (1973) 3 S.C.C. 198: A.I.R. 1972 S.C. 637.
* S.A. No. 468 of 1973. 29*th January*, 1976.

death of Unnamalai Ammal on 26th July, 1968, the plaintiffs in the present action instituted this suit for declaration and possession and for past and future mesne profits. The appellant herein, who was the first defendant in the suit, claimed to be the lessee of the suit lands under Unnamalai Ammal under the original of Exhibit A-7, dated 27th March, 1961. He put forward several contentions, even denying the title of the plaintiffs to the suit property, but the effective contention, which was put forward, and which alone was urged repeatedly before me was that the appellant is a cultivating tenant entitled to the benefits of the Tamil Nadu Cultivating Tenants Protection Act, and consequently he could not be evicted from the suit lands. Both the Courts below, following the judgment of this Court in *Mangalathachi* v. *Kalyanasundaram Mudaliar*[1], negatived this claim of the appellant, and decreed the suit as prayed for. Hence the present second appeal by the first defendant in the suit.

3. Mr. T. R. Mani, the learned counsel for the appellant, does not dispute the title of the plaintiffs to the suit property, nor the status of the appellant as the tenant of the suit property, but only contends that the appellant is entitled to the protection of the Tamil Nadu Cultivating Tenants Protection Act, and, therefore, he is not liable to be evicted in the present suit. The question for consideration is whether that contention is correct or not.

4. Of course, the Courts below relied on a decision of this Court referred to already, though a subsequent Full Bench decision in *Chandrasekaran* v. *Kunju Vanniar and others*[2], has taken a different view. However, that decision as well as the judgment of the Full Bench dealt with a case where the mortgagee in possession had leased the properties, and the question for consideration was whether the tenant under the mortgagee in possession was entitled to the protection of the Tamil Nadu Cultivating Tenants Protection Act after redemption of the mortgage. The Full Bench had no occasion to consider the question whether a tenant under a limited owner or a life estate-holder can claim the protection of the Act after the death of the lessor, *viz.*, the life estate-holder. In the present case, as I have pointed out already, under Exhibit A-5, the compromise decree, Unnamalai Ammal acquired only an interest to enjoy the property for her life and she alone had inducted the appellant into possession ; and admittedly, Unnamalai Ammal died on 26th July, 1968. The question is whether the appellant can claim the protection of the Act as against the ultimate owners of the property, *viz.*, the plaintiffs in the suit.

5. There are two direct decisions on this point by this Court. One is the Judgment of Ramanujam, J., in *O. N. Ramanathan and O. N. Krishnamurthi* v. *Raman Pullavarayar and Nagappan Ambalagarar*[1]. In that case also, under a settlement deed, one Alamelu Ammal became entitled to enjoy the property for her life, and after her death, the property belonged absolutely to the appellant in the second appeal. Ramanujam, J., had to consider whether the tenant under Alamelu Ammal could claim the rights under the Tamil Nadu Cultivating Tenants Protection Act, after the death of Alamelu Ammal as against the absolute owner. Ramanujam, J., negatived the claim of the tenant and held that he could not claim the protection of the Tamil Nadu Cultivating Tenants Protection Act.

6. The second decision is that of Mohan, J., in *Rajappa Thenkandar* v. *Ramanatha Sundaram Thenkandar and Muthukumara Thenkandar*[2]. Mohan, J., followed the judgment of Ramanujam, J., and held that a tenant from a life estate-holder will not be entitled to claim the benefit of the Tamil Nadu Cultivating Tenants Protection Act. It must be pointed out that the judgment of Mohan, J., was rendered after the judgment of the Full Bench referred to already, *viz.*, *Chandrasekaran* v. *Kunju Vanniar and others*[3]. These two judgments, though by single Judges, are binding on me, unless I am convinced that

1. (1966) 2 M.L.J. 66.
2. (1975) 88 L.W. 216: (1976) 2 M.L.J. 243 : A.I.R. 1975 Mad. 227.

1. S.A. Nos. 499 and 645 of 1970 disposed of on 3rd August, 1972.
2. S.A. No. 1691 of 1972, dated 14th July, 1975.
3. 88 L.W. 216: (1976) 2 M.L.J. 243: A.I.R. 1975 Mad 227.

the said decisions require reconsideration, in which event I shall have to refer this matter to a Bench.

7. Mr. T. R. Mani, the learned counsel for the appellant, attempted to convince me that the said two decisions are erroneous and require reconsideration. The argument of Mr. Mani is that on the analogy of section 76 (*a*) of the Transfer of Property Act, the acts done *bona fide* and prudently in the ordinary course of management by the life estate-holder will bind on the reversioners or the owners of the vested remainder. The question was actually considered by Ramanujam, J., who held that in the case of a tenant under the life estate-holder, section 76 (*a*) of the Transfer of Property Act as such will not apply, and there is no scope for applying the provisions of that section by way of analogy, because section 111 (*c*) of the Transfer of Property Act actually provides that a lease of immovable property determines where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event. As a matter of fact, in such cases, there is no scope for applying any principle of law, by way of analogy, because the right that is claimed by the appellant herein is a specific right pursuant to a particular statutory provision, and, therefore, the question of applying the principles contained in section 76 (*a*) of the Transfer of Property Act by way of analogy, does not arise.

8. The second submission of Mr. Mani that admittedly Unnamalai ammal was entitled to collect the rents from the appellant, and was actually collecting the rents from him, and, therefore, she will be the landlord as defined in the Tamil Nadu Cultivating Tenants Protection Act, and the tenancy agreement under the original of Exhibit A-7 entered into between Unnamalai Ammal and the appellant would come within the scope of that Act, so as to make the appellant a cultivating tenant entitled to protection under that Act. I am unable to accept this argument either. In the first place, the two judgments referred to above dealt with the identical circumstances with regard to the provisions contained in the Tamil Nadu Cultivating Tenants Protection Act, and, therefore, unless I hold that the learned Judges had failed to take into account the provisions contained in the Act, I cannot say that their judgments require reconsideration. Apart from that, the conclusion arrived at by them is not rested on any provision contained in the Tamil Nadu Cultivating Tenants Protection Act, but on the normal and general rule that a grantor cannot confer on another a large interest then he himself had in the property. In view of this, I am of the opinion that there is no substance in this contention either.

9. Thirdly, Mr. Mani contends that several decisions with reference to section 76 (*a*) of the Transfer of Property Act has held that if a mortgagee in possession had leased out the mortgaged property in *bona fide* exercise of his right to enjoy the property and the transaction happened to be a prudent transaction, the tenant would acquire the rights conferred by statutes subsequent to the tenancy. In my opinion, this argument is misconceived. In the first place, the said principle has been applied by the Courts only with reference to section 76 (*a*) of the Transfer of Property Act, and once it is held that section 76 (*a*) will not apply to the tenancy created by a limited owner, the question involved is one of absence of power and not the manner of exercise of power. Under these circumstances, I am unable to hold that the decisions of Ramanujam, J., and Mohan, J., referred to already require reconsideration, and following those judgments it must be held that the appellant is not entitled to the protection of the Tamil Nadu Cultivating Tenants Protection Act.

10. Accordingly, the second appeal fails and it is dismissed. There will be no order as to costs. No leave.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail, J.*

The State Wakf Board, Madras, superseded by the Government of Tamil Nadu in G.O. Ms. No. 2031, dated 20th November, 1967 and appointed by G.O. Ms. No. 2264 dated 30th December, 1967. The Special Officer for Wakfs, Madras ... *Plaintiff**

v.

Subramanyam and others ... *Respondents.*

Limitation Act (XXXVI of 1963), Article 96—Wakfs Act (XXIX of 1954), section 15—Suit for recovery of possession of wakf properties—Whether barred by limitation—Scope of Article 96, Limitation Act, 1963.

The combined effect of section 15 (1) and 15 (2) of the Wakfs Act would certainly be sufficient to designate the Wakf Board as a manager for the purpose of recovery of possession of wakf property and consequently the Board could certainly be termed as "Manager" contemplated by the third column to Article 96 of the Limitation Act, 1963, and if so construed, the constitution of the Wakf Board under the statute could certainly be construed to be the appointment of the Wakf Board as "Manager" of the wakf in question; because even the word "appointment" just like the word "Manager" was not a term of art and therefore had to receive its ordinary, natural and normal meaning. [*Para.* 7.]

The Wakf Board was a "Manager" as contemplated by Article 96 of the Limitation Act of 1963 and the constitution of the Wakf Board under the Wakf Act would constitute the appointment of such Board as manager of the wakfs in question. If so, the Wakf Board having come into existence in 1958 and the suits having been instituted in 1967, the suits were well within time according to Article 96 of the Limitation Act, 1963. [*Para.* 8.]

Cases referred to:—

Chinna Jeeyangar Mutt, Tirupathi v. *C. V. Purushotham and others*, (1973) 2 An.W.R. 302 ; A.I.R. 1974 A.P. 175; *L. Machi Reddy* v. *The Wakf Board of Andhra Pradesh*, (1972) 2 An.W.R. 237: (1972) 2 A.P.L.J. 390 : (1972) 2 An.L.T. 279 : A.I.R. 1973 A.P. 73.

Appeals against the decree of the District Court of West Thanjavur at Thanjavur in Appeal Suit Nos. 183, 184, 185 and 187 of 1969 preferred against the decrees of the Court of the District Munsif of Pattukottai in Original Suit Nos. 784, 786, 788 and 790 of 1967 respectively.

M. A. Sattar Sayeed and *S. I. Samiullah* and *S. M. Hameed Mohideen*, for Appellant.

K. Venkataramani, S. B. Mani and *V. Subramanian*, for Respondents.

The Court delivered the following

JUDGMENT.—All these second appeals arise out of a common judgment rendered by the learned District Munsif of Pattukottai in O.S. Nos. 784, 786, 788 and 790 of 1967 and the appeals arising therefrom on the file of the Court of the District Judge, West Thanjavur, Thanjavur. The appellant in all these second appeals is one and the same, namely, the State Wakf Board, Madras, represented by its Secretary. The suits were instituted for recovery of the properties involved in these suits. According to the appellant, the properties were wakf properties, they have been alienated by one Sheik Dawood illegally and unauthorisedly, and therefore the appellant was entitled to recover possession of those properties. The defence put forward by the various defendants are reflected in the following issues framed for trial by the trial Court :

(1) Whether the suit properties are part of the wakf properties belonging to Asarpakkiri Thaikkal ?

(2) If the suit properties are wakf properties whether the defendants have perfected their title by adverse possession ?

(3) Whether there is merely a charge for Rs. 27 every year on the income from all the wakf properties ?

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*S.A. Nos. 445, 446, 447 and 449 of 1971.
24*th March,* 1976.

(4) Whether the suit is not maintainable after the supersession of the State Wakf Board ?

(5) To what relief, if any, is the plaintiff entitled ?

2. The learned District Munsif, who tried the suits, held that the suit properties were wakf properties and further held on issue No. 3 that it was not, merely a sum of Rs. 27 per year that was charged on the properties in question. He also held that the suits were maintainable. But he dismissed all the suits only on the ground that they were barred by limitation. On appeals preferred by the appellant herein, the learned District Judge of West Thanjavur, Thanjavur, confirmed the findings of the trial Court on all the points and dismissed the suits only on the ground of limitation again. It is against these judgments and decrees that the present second appeals have been preferred by the plaintiff in the suits.

2. The learned counsel for the appellant contends that the Courts below erred in holding that even on the application of Article 96 of the Schedule to the Limitation Act, 1963, the suits are barred by limitation. According to the Courts below, it is Article 96 of the Limitation Act, 1963, which has replaced Articles 134-B and 134-C of the First Schedule to the Limitation Act, 1908 that applied to the case and even on the application of that Article, the suits were barred by limitation, because the vendor who sold the suit properties died in 1953 and the suits were instituted only in 1967 after the expiry of more than 12 years. The learned counsel for the appellant contends that this conclusion of the Courts below is erroneous and for this purpose relies on two judgments of this Court and two judgments of the High Court of Andhra Pradesh. Before I refer to the judgments relied on, it is easier to extract the relevant Articles of the Limitation Act applicable to the present case. Article 134-B of the Limitation Act, 1908 related to recovery of possession of immovable property comprised in an endowment, while Article 134-C was concerned with recovery of possession of movable property comprised in an endowment. Since we are concerned in the present suits only with immovable properties, the relevant Article of the First Schedule to the Limitation Act, 1908, is Article 134-B and the same reads as follows :

Description of suit.	*Period of limitation.*	*Time from which period begins to run*
By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years.	The death, resignation or removal of the transferor

It is Articles 134-B and 134-C that have been replaced by Article 96 of the Schedule to the Limitation Act, 1963, and the same is as follows :

Description of suit.	*Period of limitation.*	*Time from which period begins to run.*
By the manager of a Hindu, Muslim or Buddhist religious or charitable endowment to recover possession of movable or immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years.	The date of death, resignation or removal of the transferor or the date of appointment of the plaintiff as manager of the endowment whichever is later.

4. The most important thing to notice is the entries in Col. 3 in the old Article 134-B and the new Article 96. In Article 134-B the time from which the period begins to run, as mentioned in Col. 3 therein, was, "the death, resignation or removal of the transferor." As against this, Col. 3 in Article 96 relating to the time from which period begins to run is, "the date of death, resignation or removal of the transferor or the date of appointment of the plaintiff as manager of the endowment whichever is later." The most important change made in the third column in Article 96 of the new Act is the introduction of "the date of appointment of the plaintiff as manager" and the further provision, "whichever is later". The Courts below failed to pay any attention whatever to this change in the third column in Article 96 in the new Act and proceeded as if the third column of Article 134-B of the old Act governed the present cases. It is with reference to this change, Natarajan, J., in *Somathammal and five others* v. *The Tamil Nadu State Wakf Board through its Secretary, Madras-4*[1], stated:

> "The last contention on which considerable stress is placed by the learned counsel for the appellants is that in any event the suit had become barred by limitation on the date when the Wakf Board instituted the suit and consequently the suit must have been dismissed. In support of this contention it is pointed out that the Wakf Board has lost possession of the property even in the year 1929 when Exhibit B-3 was executed and as no suit has been filed within the statutory period to set aside the alienation, the present suit for declaration and possession was not maintainable. This contention unfortunately overlooks many factors. As already stated, the Wakf Board itself was constituted in the year 1958 and the Wakf Act empowers the Board constituted under the Act to institute proceedings for recovery of the properties of a wakf which had been lost to the trust by an adverse action of the muthavalli. Section 15 of the Act which specified the functions of the Wakf Board *inter alia* provides under sub-clause (2) (*h*) that the Wakf Board was empowered to take measures for the recovery of lost properties of any wakf. Having been constituted only in the year 1958 the Board had a 12 year period to institute an action of the kind in hand for recovery of property lost to the wakf and when admittedly the suit had been instituted in the year 1967 itself, the Board was well within time in filing the suit. Even otherwise, it is to be noted that Article 96 of the Limitation Act, 1963 has made a significant change in the period of limitation in respect of suits which are to be instituted by the manager of a Hindu, Muslim or Buddhist religious or charitable endowment to recover possession of movable or immovable property comprised in the endowment which had been transferred by a previous manager for a valuable consideration. While the Indian Limitation Act, 1908 under Article 134 (*c*) had stated that the starting point of limitation for a suit of the kind referred to above would be the date of death or resignation or removal from office of the huq, Article 96 of the present Limitation Act has further added that the date of appointment of the plaintiff as manager of the endowment would also be a starting point of limitation and that the later event *viz.*, the date of death, resignation or removal of the transferor or the date of appointment of the plaintiff as manager of the endowment would govern the situation. Though the Wakf Board cannot be deemed to be the manager of the endowment in question, nevertheless by reason of the power given to it under section 15 (2) (*h*) of the Wakf Act the Board is empowered to step into the shoes of the manager and institute a suit as contemplated under Article 96. It is therefore futile for the appellants to contend that the suit was patently barred by limitation on the date it was filed."

5. The learned Judge in another judgment of his, namely *Thangiahvelar and another* v. *Tamil Nadu State Wakf Board, Madras, through its Secretary and another*[1],

1. S.A. No. 400 of 1972—Judgment dated 11-7-1975.

1. S.A. No. 456 of 1972—Judgment dated 29-7-1975.

took the same view. In both the judgments the learned Judge also referred to the decision of the Andhra Pradesh High Court in *Chinna Jeeyangar Mutt, Tirupathi* v. *C. V. Purushotham and others*[1]. That judgment elaborately dealt with the relevant articles of the old and new Limitation Acts, namely, Articles 134-B and 134-C of the Old Limitation Act and Article 96 of the new Limitation Act and brought out clearly the changes effected by the new enactment. Natarajan, J., in the former of the two judgments referred to already has agreed with the following observations of the Andhra Pradesh High Court in the judgment referred to above:

> "By virtue of this amendment, if the plaintiff had been appointed within 12 years from the date of the filing of the suit, he can question any alienation, which was not made for legal necessity or benefit to a Mutt by a previous manager. The fact that 12 years have elapsed from the date of death, resignation or removal of the transferor-manager would not stand in the way of the plaintiff in such a suit from recovering the property. That is clear from the last three words in the amendment 'whichever is later' purposely introduced by the Legislature. In view of this amendment the Courts have got to apply the plain words of the statute to any action brought by any manager of a Hindu, Muslim or Buddhist religious or charitable endowment, to recover possession of the movable or immovable property of an endowment which was the subject of an alienation by a previous manager for valuable consideration. It is also clear that the transferor-manager need not be the immediate predecessor of the plaintiff, that files such a suit. From a reading of Article 96, such a conclusion cannot be arrived at. It is enough if the alienation was made by a previous manager. The first column does not say that it should be by the previous manager."

Thus, the decision of Natarajan, J., in this Court and the decision of the Andhra Pradesh High Court with which Natarajan J., agreed, fully support the contention of the appellant, namely, that even applying Article 96 of the new Act, the suits are within time, because the Wakf Board was constituted only in 1958 and the suits themselves were instituted in the present cases in 1967 before the expiry of 12 years as provided for in Article 96 of the new Act.

6. However, the learned counsel for the respondents sought to counter the above position by putting forward the contention that the Wakf Board cannot be said to be a manager appointed within the meaning of the expression as contained in the third column to Article 96 of the new Act. This question has been considered by Natarajan, J., himself and the learned Judge has pointed out that the Wakf Board is empowered to step into the shoes of the manager and therefore will come within the scope of the third column of Article 96 of the new Act. However, Mr. Venkataramani contended that having regard to the scheme of the Wakf Act itself, the Wakf Board cannot be said to be a manager for this purpose. In support of this contention, he relied on sections 42 and 43-A of the Wakf Act, 1954. Section 42 of the Wakf Act provides that when there is a vacancy in the office of the mutawalli of a wakf and there is no one to be appointed under the terms of the deed of wakf, or where right of any person to act as mutawalli is disputed the Board may appoint any person to act as mutawalli for such period and on such conditions as it may think fit. Section 43-A which was introduced by the Central Act XXXIV of 1964 enables the Wakf Board to assume direct management of certain wakfs. Sub-section (1) of section 43-A is:

> "Where no suitable person is available for appointment as a mutawalli of a wakf under section 42 or under sub-section (2) of section 43, the Board may, by notification in the Official Gazette, assume direct management of the wakf for such period or periods, not exceeding in the aggregate five years, as may be specified in the notification."

7. The argument of the learned counsel now is that only when the Wakf Board assumes direct management of the wakf,

1. (1973) 2 An.W.R. 302 : A.I.R. 1974 A.P. 175.

it can be said to be a manager as contemplated by the third column in Article 96 of the new Act and that so long as there is no assumption of direct management, the Wakf Board cannot be said to be a manager. I am unable to accept this argument, from one point of view. Neither section 42 nor section 43-A of the Wakf Act on which reliance has been placed uses the word, "Manager". The word "Manager" in relation to a religious or charitable endowment is not a term of art. The said word denotes the person who is in charge of the administration of the endowment or manages the property or supervises the performance of the charity and the word is one of very wide and general import. As a matter of fact, the judgment of Natarajan, J., has referred to the provisions contained in section 15 (2) of the Wakfs Act. Section 15 (1) of the Wakfs Act provides that subject to any rules that may be made under the said Act, the general superintendence of all wakfs in a State shall vest in the Board established for the State ; and it shall be the duty of the Board so to exercise its powers under the Act as to ensure that the wakfs under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such wakfs were created or intended. Sub-section (2) of section 15, without prejudice to the generality of the powers conferred by sub-section (1), by way of illustration, enumerates certain specified powers also. One such specified power so enumerated is contained in section 12 (2) (*h*), which enables the Wakf Board to take measures for the recovery of lost properties of any wakf. Section 15 (2) (*i*) also enables the Wakf Board to institute and defend suits and proceedings in a Court of law relating to wakfs. The combined effect of section 15 (1) and 15 (2) of the Wakfs Act will certainly be sufficient to designate the Wakf Board as a manager for the purpose of recovery of possession of wakf property and consequently it can certainly be termed as "Manager" contemplated by the third column of Article 96 of the new Limitation Act and if so construed, the constitution of the Wakf Board under the statute can certainly be construed to be the appointment of the Wakf Board as Manager of the wakf in question, because even the word, "appointment" just like the word, "Manager" is not a term of art and therefore, has to receive its ordinary, natural and normal meaning.

8. In fact, there is a judgment of the High Court of Andhra Pradesh dealing with the same question in *L. Machi Reddy* v. *The Wakf Board of A.P.*[1]. In that judgment, the Andhra Pradesh High Court pointed out:

> "In so far as the capacity of the Board to institute the present suit as manager is concerned, section 15 of the Wakf Act makes it abundantly, plain that subject to any rules that may be made under the said Act, the general superintendence of all wakfs in a State shall vest in the Board established for the State; and it shall be the duty of the Board so to exercise its powers under the said Act as to ensure that the wakfs under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such wakfs were created or intended. Thus, a very wide power is given to the Board not only to supervise the functioning of these wakfs but to see that they are properly maintained, controlled and administered. The Board is specially charged with the duty to see that the income of the wakfs is duly applied to the objects and for the purposes for which the wakfs were created or intended. Apart from this general power which section 15 (1) confers on the Board, clauses (*h*) and (*i*) of sub-section (2) of that section specifically empower the Board to take measures for the recovery of lost properties of any wakf and to institute and defend suits and proceedings in a Court of law relating to wakfs.

What must necessarily follow therefore is that the Wakf Board having supervisory powers and having special duties to perform is not only entitled

1. (1972) 2 An.W.R. 237 : (1972) 2 A.P.L.J. 390 : (1972) 2 An.L.T. 279 : A.I.R. 1973 A.P. 73.

to file the suit for recovery of the property lost to the wakf but also can manage and administer the property or see that the properties are properly managed and administered and its income applied to the objects and for the purposes for which the wakf was created or intended. Keeping in view these statutory functions and the powers of supervision of the Wakf Board over the wakfs, I do not experience any difficulty in holding that the Wakf Board is a Manager within the meaning of Article 96 of the Limitation Act."

For the reasons already indicated by me, I am in entire agreement with the above reasoning and conclusion of the High Court of Andhra Pradesh. The result of this will be that the Wakf Board is a manager as contemplated by Article 96 of the new Act and the constitution of the Wakf Board under the Wakf Act will constitute the appointment of the Wakf Board as manager of the wakfs in question. If so, the Wakf Board having come into existence in 1958 and the suits having been instituted in 1967, the suits are well within time according to Article 96 of the new Limitation Act and therefore the suits cannot be said to have been barred by limitation.

9. Having realised this position, the learned counsel for the respondents sought to sustain the judgments of the Courts below on a different point, namely, that Sheik Dawood, who executed the sale deeds in question, was made an absolute owner of the properties under the original of Exhibit A-2, the will executed by Ibrahim Bivi and that therefore he had the capacity to alienate the properties and hence the appellant cannot question the said alienations. Since this argument was an involved one, I asked the learned counsel for the respondents to state whether it was his contention that the properties were not wakf properties at all and even then the learned counsel merely stated that it might amount to such an argument. However, the very document Exhibit A-2 relied on by the learned counsel will completely negative this argument. Exhibit A-2 itself does not proceed on the basis that the properties belonged to Ibrahim Bivi and that she was creating a wakf over the properties for the first time under that document. On the other hand, the terms of Exhibit A-2 make it clear that the properties had become wakf properties long ago and that they were being treated as wakf properties from time immemorial. The language used in Exhibit A-2 is:

"அடியிற் கண்ட சொத்துக்கள் என் புருஷனுடைய முன்னோர் கால முதல் ஷெடி ணைதக் கால் அல்லா கோவிலுக்கு மான்யமாய் விடப்பட்டு"

These very recitals contained in Exhibit A-2 make it clear that the properties had been endowed as wakf properties by the forefathers of the husband of Ibrahim Bivi, the person who executed the original of Exhibit A-2. If so, the question of the said Ibrahim Bivi conferring absolute powers on her son Sheik Dawood, who executed the sale deeds in question, cannot possibly arise.

10. No other point was urged before me.

11. Under these circumstances, the second appeals succeed and they are allowed and the judgments and decrees of the Courts below are set aside and the suits instituted by the appellant herein will stand decreed. The parties will bear their respective costs throughout. No leave.

S.J. ——— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Natarajan, J.*

Gnanammal .. *Appellant**

v.

Elayaperumal Nadar and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), *section* 9-A, *Limitation Act (XXXVI of* 1963), *Article* 61, *Transfer of Property Act (IV of* 1882), *section* 62—*Usufructuary mortgage—Suit for redemption—Mortgagee in possession for more than thirty years—Effect of Amendment of Act IV of* 1938 *by Act XXIV of* 1950—*Mortgagor entitled to redeem the mortgage—Claim of adverse possession by mortgagee—Invalid.*

The plaintiff filed the suit for redemption of a usufructuary mortgage created on 29th March, 1899 and claimed the right to redeem it under Madras Act IV of 1938 as amended by Act XXIV of 1950. The suit was dismissed by the trial Court and the lower appellate Court on the ground of limitation. On second appeal by the plaintiff,

Held: By reason of the operation of the Madras Act IV of 1938, the mortgage debt must be deemed to have been wiped out on the day the Amended Act came into force, for, by then the mortgagee or his successor-in-interest had been in possession of the property for more than the period of thirty years prescribed under the Act. Consequently, the appellant had a statutory right from that date under the provisions of section 62 of the Transfer of Property Act to seek recovery of possession. As the appellant had filed the suit within a period of thirty years from the date the debt got extinguished by virtue of the Act (IV of 1938), the appellant must be held entitled to recover possession of the suit property. [*Para.* 7.]

The respondents could not be heard to say that from the date of the wiping out of the mortgage debt by the operation of law, their possession had become adverse to the appellant and therefore the suit filed beyond twelve years was barred by limitation; more so, when there was nothing to show that the respondents had set up hostile title in themselves over the suit property. [*Para.* 8.]

Cases referred to :—

L. C. Mills v. *Aluminium Corporation of India*, (1971) 2 S.C.R. 623 : A.I.R. 1971 S.C. 1482; *Veerabahu Pattar* v. *Easwara Pillai*, (1975) 88 L.W. 17 : (1975) 1 M.L.J. 31 : A.I.R. 1975 Mad. 171; *Jalali* v. *Anusuddin*, (1974) 2 M.L.J. 9 : 87 L.W. 430 : A.I.R. 1974 Mad. 340; *Konthalavalli Achi* v. *Ayyadurai Odayar*, (1961) 2 M.L.J. 427 : I.L.R. (1961) Mad. 1029 : 74 L.W. 544 : A.I.R. 1962 Mad. 21; *Ram Prasad* v. *Bishambhar Singh*, A.I.R. 1946 All. 400; *Parasram* v. *Bindeshari*, A.I.R. 1953 All. 33; *Avanthan* v. *Krishna Pillai*, A.I.R. 1957 T.C. 145; *Prithi Nath Singh* v. *Suraj Ahir*, (1963) 3 S.C.R. 302 : A.I.R. 1963 S.C. 1041 ; *Lilachand* v. *Mallappa*, 1960 S.C.J. 96 : (1960) 1 S.C.R. 693: A.I.R. 1960 S.C. 85; *Khiarajmal* v. *Daim*, I.L.R. (1905) 32 Cal. 296; *Mulchand* v. *Ganga*, A.I.R. 1951 Nag. 366; *Ismail Maracair* v. *Doraisami*, (1959) 2 M.L.J. 74 : 71 L.W. 606 : I.L.R. (1958) Mad. 1066 : A.I.R. 1958 Mad. 621.

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin in Appeal Suit No. 7 of 1971 preferred against the decree of the Court of the District Munsif, Srivaikuntam in Original Suit No. 441 of 1968.

S. Padmanabhan, for Appellant.

Raj and Raj, for 1st Respondent.

C. Kandaswamy, for 2nd and 4th Respondents.

A. K. Sridharan, for 3rd Respondent.

The Court delivered the following

JUDGMENT.—The question for debate in the second appeal preferred by the plaintiff is whether the finding of the learned District Munsif, Srivaikuntam in O.S. No. 441 of 1968 which was confirmed by the Subordinate Judge,

* S.A. No. 1342 of 1972. 24*th October*, 1975.

Tuticorin in A.S. No. 7 of 1971, that item (1) of the suit property did not belong to the predecessor-in-title of the appellant and that item (2) of the suit property was not liable for redemption and recovery of possession on the ground of limitation, is a correct one. In her suit, the appellant sought redemption and recovery of possession of two items of land, survey Nos. 746/2 and 746/1, of 83 cents and 44 cents respectively. Her case was that both the items were originally owned by one Namasivaya Mudaliar who sold them under Exhibit A-3 on 23rd July, 1862 to one Paranjothi Nadar. Under the original of Exhibit A-4 dated 13th May, 1871, Paranjothi Nadar sold the two items to one Yesuvadial. On Yesuvadial's death, her daughter Muthayee succeeded to her property. When Muthayee too died, her husband, Augustus Masilamani Nadar, succeeded to the property. He subsequently bequeathed the property by means of a Will to his foster-daughter, the appellant herein, and that is how the appellant claims title to the suit property. According to the appellant, her foster-mother Muthayee Ammal, had executed a usufructuary mortgage deed on 29th March, 1899 under the original Exhibit A-9 in favour of one Solomon Nadar. It was the redemption of this othi that was sought for by the appellant in her suit. Solomon Nadar, by Exhibit A-10 dated 15th January, 1901 sub-othied the suit property in favour of one Yesuvadia Nadar and two others. Later, Solomon Nadar assigned his othi rights to one AbrahamNadar under the original of Exhibit A-11 on 7th August, 1908. The assignee, Abraham Nadar retained item (2) and assigned the othi in respect of item (1) alone to one Koilpillai under the original of Exhibit A-12 on 8th May, 1913. It was the appellant's case that respondents 2 and 3, the daughters-in-law of Solomon Nadar, and the first respondent, a stranger, were in possession of the suit items only as othidars and were therefore bound to be redeemed and deliver possession. To bring the suit within time, the appellant took the stand that the recitals contained in Exhibits A-11 and A-12 constituted acknowledgments of the subsistence of the othi and would, therefore, attract the operation of section 18 of the Limitation Act, 1963 (corresponding to section 19 of the old Act of 1908). The further case of the appellant was that, by reason of the provisions of Madras Act IV of 1938 as amended by Act XXIV of 1950, the entire mortgage debt was wiped out and as such, no amount was due to the mortgagees.

2. The principal defence raised in the suit by the respondents was that the suit was barred by limitation as the recitals contained in Exhibits A-11 and A-12 did not amount to acknowledgments of liability. The other defence in the case was that the suit items do not belong to the predecessors-in-title of the appellant and, on the other hand, were owned by the predecessors-in-title of the respondents. With regard to item (1) the first respondent contended that it was originally owned by one Devasahayam Nadar. Eventually, one of the sons of Devasahayam Nadar, by name Koilpillai Nadar, acquired the sole right over that item and he usufructuarily mortgaged the property to one Esther Ammal. Subsequently, he sold the property to Esther Ammal herself under Exhibit B-2 and Esther Ammal, in turn, had sold the property to him under Exhibit B-1 and therefore, he was in possession of suit item (1) in his own right and not as an othidar. The second respondent as well as her vendee, *pendente lite* the fourth respondent, on the one hand and the third respondent on the other laid rival claims to item (2) of the suit property, but it is not necessary to make reference to the details of their claims as it has been found by both the Courts below that they have not established their title to the said item of property.

3. In the trial of the suit, the learned District Munsif found that item (1) of the suit property was not owned by Muthayee Ammal, the predecessor-in-title of the appellant, but was actually owned by Devasahayam Nadar, the predecessor-in-title of the first respondent. As regards the second item, the District Munsif found that the recitals contained in Exhibits A-11 and A-12 did not constitute acknowledgments of the subsistence of the othi created under Exhibit A-9 and therefore, the suit instituted in 1968

for redemption of a mortgage created in 1899 was out of time. Consequently, the learned District Munsif dismissed the suit and the dismissal was sustained by the Subordinate Judge of Tuticorin in the appeal preferred by the appellant. The appellant has now come forward with the second appeal to assail the judgments of the Courts below.

4. Mr. Padmanabhan, learned counsel for the appellant, made a vain bid to contend that the finding of the Courts below that the appellant had no title over item (1) of the suit property was erroneous. But, I am afraid, there is very little material in the case to lend support to the appellant's claim that Muthayee, her predecessor-in-interest had title to the first item of the suit property. Excepting the fact that item (1) had also been included by Muthayee in the othi created by her under Exhibit A-9, there is no other document to show how she or her predecessors-in-title acquired rights to that item of property. The prior documents of title, Exhibits A-3 and A-4, do not contain any clear reference to item (1). The survey number as well as the patta number for that land are not adverted to in Exhibits A-3 and A-4. On the other hand, we find that the documents produced by the first respondent lend support to his contention that item (1) was originally owned by his predecessor-in-title, *viz.*, Devasahayam Nadar. Exhibits B-21 and B-22, which are extracts from the settlement and re-settlement registers, unmistakably show that Devasahayam Nadar was recognised as pattadar of item (1) of the suit property. If really Paranjothi Nadar, from whom Muthayee's mother, Yesuvadial had purchased the properties under Exhibit A-4, was the owner of item (2) as well as item (1), he would have been shown as the pattadar, in the settlement and re-settlement registers, of both the items but, significantly enough, Paranjothi Nadar is shown in the settlement and re-settlement registers as the pattadar of item (2) alone and not of item (1). As already stated, it is Devasahayam Nadar who is shown, in the registers, as the pattadar of item (1). Besides the entries in the settlement registers, we have also the prior sale deeds, Exhibits A-13 and B-1 as well as the mortgage deed, Exhibit B-3 which lend support to the claim of the first respondent that one of the sons of Devasahayam Nadar by name Koilpillai Nadar acquired sole rights over item (1) by reason of purchase from his brothers and later on he mortgaged the property to Esther Ammal and, eventually, sold his equity of redemption as well. The first respondent had produced pattas in his name for the said item and even in the patta, Exhibit A-7, filed by the appellant herself, it is found that Devasahayam Nadar is shown as the pattadar for item (1). Thus from Exhibit A-7 itself, it is seen that, as early as fasli 1302, the first respondent's predecessor-in-title had been shown to be the pattadar in possession of the first item of the suit property. In such circumstances, it is futile for the appellant to contend, merely by placing reliance on the recitals contained Exhibit A-9, that Muthayee Ammal was the owner of both the items of the suit property and therefore, she was entitled to sue for redemption and possession of not only suit item (2), but also suit item (1). The dismissal of the suit by the District Munsif and the Subordinate Judge with regard to item (1) of the suit property must, therefore, be upheld.

5. Turning, now, to item (2) of the suit property, there can be no doubt whatever that it was owned by Muthayee and consequently, the appellant is entitled to seek redemption of the othi created under Exhibit A-9. The question, however, for consideration is whether the appellant's suit filed beyond a period of sixty years from the date of the othi is within time. To get over the bar of limitation, Mr. Padmanabhan, advanced a two-fold contention. The first was that the othi assignment deeds, Exhibits A-11 and A-12, executed by Solomon Nadar and Abraham Nadar respectively contained acknowledgments regarding the subsistence of the othi under Exhibit A-9 and therefore, those documents afford fresh starting points of limitation for proceedings for redemption and recovery of possession. The ratio in *L. C. Mills* v. *Aluminium Corporation of*

India[1], which has been followed by V. Ramaswami, J., in *Veerabahu Pattar* v. *Easwara Pillai*[2]. and *Somanatha Pillai* v. *Velayudham Pillai and others*[3] that the words used in a statement, on which the plea of acknowledgment is founded, must relate to a present subsisting liability and indicate the existence of jural relationship between the parties, such as, for instance, that of a debtor and a creditor and the intention to admit such jural relationship, was sought to be distinguished by the learned counsel on the ground that, in the instant case, there is a specific admission in Exhibits A-11 and A-12 about the subsistence and binding effect of the othi created under Exhibit A-9 and, therefore, the appellant was entitled to invoke the extended period of limitation conferred by section 18 of the Limitation Act. Mr. Padmanabhan further tried to canvass that the appellant's case would be governed by the rule laid down by Ramanujam, J., in *Jalali* v. *Anusuddin*[4], where the learned Judge, construing the terms of an assignment deed, exhibited in that case, held that the deed contained clear recitals of acknowledgment and therefore, the mortgagor was entitled to a fresh starting point of limitation from the date of the assignment deed for filing the suit for redemption. On a consideration of the matter, I find that the contention of Mr. Padmanabhan in this behalf cannot be sustained. A perusal of Exhibits A-11 and A-12 go to show that there is nothing in those documents to warrant the inference that either of the executants of the deeds had acknowledged the right of the mortgagor or the liability of the mortgagee under Exhibit A-9 in relation to the othi transaction. While Exhibit A-12 makes no reference at all to the mortgage under Exhibit A-9, Exhibit A-11 makes only a casual reference to the othi created under Exhibit A-9. There is a direction in Exhibit A-11 to the assignee to redeem the subothi created under Exhibit A-10, but there is no reference whatever to the rights and obligations of the parties to Exhibit A-9. In such circumstances, it must be held that the reference to Exhibit A-9 in Exhibit A-11 was only a passing or casual reference and there was no conscious acknowledgment, as required by law, of the mortgagee's liability to be redeemed or the right of the mortgagor to redeem the othi created under Exhibit A-9. The Courts below were, therefore well founded in their rejection of the appellant's contention that Exhibits A-11 and A-12 constituted acknowledgments which had the effect of attracting the operation of section 18 of the Limitation Act to the facts of the case.

6. Apart from this feature, there is one other factor also, which militates against the appellant's case, that the recitals in Exhibit A-11 afforded the appellant a fresh period of limitation. The assignment under Exhibit A-11 was effected on 7th August, 1908, while the suit was filed by the appellant only on 8th August, 1968, *i.e.*, one day after the sixty year period allowed by law. 7th August, 1968 was not a holiday and therefore, the suit filed on the 8th August, was undoubtedly out of time. Therefore, even assuming that the recitals in Exhibit A-11 afforded scope to the appellant to claim a fresh period of limitation from 7th August, 1908 that cannot have any impact on the case, as the suit had been filed beyond the period of sixty years.

7. That leaves for consideration the second ground urged by Mr. Padmanabhan for bringing the suit within time. This contention is based on the provisions contained in the Madras Agriculturists' Relief Act (IV of 1938) as amended by Act XXIV of 1950. As has been held by a Full Bench of this Court in *Konthalavalli Achi* v. *Ayyadurai Odayar*[1]. Section 9-A of Act IV of 1938 as amended by Act XXIV of 1950 is not restricted in its application to usufructuary mortgages as defined in section 58 (*d*) of the Transfer of Property Act, but applies to all mortgages by virtue of which the mortgagee is entitled to remain in possession of the pro-

1. (1971) 2 S.C.R. 623 : A.I.R. 1971 S.C. 1482.
2. (1975) 88 L.W. 17 : (1975) 1 M.L.J. 31 : A.I.R. 1975 Mad. 171.
3. S.A. No. 11 of 1972 (Judgment of this Court, dated 13th February, 1975).
4. (1974) 2 M.L.J. 9 : 87 L.W. 430 : A.I.R. 1974 Mad. 340.

1. (1961) 2 M.L.J. 427 (F.B.): I.L.R. (1961) Mad. 1029 : 74 L.W. 544: A.I.R. 1962 Mad. 21

perty mortgaged. Applying, therefore the terms contained in section 9-A the argument of Mr. Padmanabhan is that the mortgagee under Exhibit A-9 had been in possession of the othied property for more than thirty years and therefore, the mortgagor, whose successor-in-interest the appellant is, is entitled to seek redemption and recovery of possession of the mortgaged property by reason of the deeming provision in the Act that the mortgage debt must be deemed to have been wiped out by reason of the mortgagee having been in possession of the mortgaged property for over thirty years. Mr. Padmanabhan would, therefore, contend that with effect from 18th October, 1950 when Act XXIV of 1950 came into force, the appellant had a sixty-year-period under the Limitation Act of 1908 and a thirty-year-period under the Limitation Act of 1963, to institute the suit for redemption or recovery of possession of immovable property which had been mortgaged. In support of this proposition the learned counsel placed reliance on *Ram Prasad* v. *Bishambhar Singh*[1], where in a suit instituted by a mortgagor under section 9 of the U. P. Debt Redemption Act, the Court held that the suit must be construed to be one against a former mortgagee to recover possession of immovable property, that the suit would fall more appropriately under section 62 than under section 60 of the Transfer of Property Act and that the plaintiff was entitled to invoke the second limb of Article 148 of the Limitation Act and claim a time-limit of sixty years for filing a suit for recovery of possession from the date the mortgage debt was deemed wiped out by the operation of law. The ratio in the case cited above has been followed by another Bench of the Allahabad High Court in *Parasram* v. *Bindeshari*[2] and the Bench expressed its view in the following words :

> "In an application under section 12, U. P. Agriculturists Relief Act, 1934, it is open to a usufructuary mortgagor to ask for recovery of possession of the mortgaged property without the payment of the mortgage money if the mortgage money has been paid up from the usufruct of the property, and the period of limitation for such an application is sixty years from the date when the mortgage money was so satisfied and the right to recover possession accrued."

Having regard to the terms of section 9-A of Madras Act IV of 1938 as amended by Act XXIV of 1950, read with Article 61 of the Limitation Act of 1963 (which corresponds to Article 148 of the old Limitation Act, except that the period fixed is thirty years in the new Act instead of sixty years in the old Act), I am of opinion that the plea of the appellant that she is entitled to seek for recovery of possession of item (2) of the suit property is, undoubtedly well founded. By reason of the operation of the Madras Act IV of 1938, the mortgage debt created under Exhibit A-9 must be deemed to have been wiped out on the day the amended Act came into force, for, by then, the mortgagee or his successor-in-interest had been in possession of the property for more than the period of thirty years prescribed under the Act. Consequently, the appellant had a statutory right from that date under the provisions of section 62 of the Transfer of Property Act to seek recovery of possession. As the appellant's suit had been filed within a period of thirty years from the date of the debt got extinguished by virtue of the Act, the appellant must be held entitled to recover possession of item (2) of the suit property. This aspect of the matter had not been considered by the Courts below and therefore, the dismissal of the appellant's suit in respect of item (2) cannot be sustained.

8. Mr. Kanakaraj, learned counsel for the respondents, would however, contend that the period of thirty years under Article 61 of the new Limitation Act can be availed of by the appellant only if the mortgage was subsisting, and not otherwise. His argument is that since the mortgage debt had been wiped out by Act IV of 1938 as amended by Act XXIV of 1950 on 18th October, 1950 itself, the relationship between the parties, as on and from that date, would not be that of mortgagor and mortgagee, but only that of owner and trespasser. Therefore,

1. A.I.R. 1946 All. 400.
2. A.I.R. 1953 All. 33.

the appellant's suit filed beyond the period of twelve years for recovery of possession would be barred by limitation. According to Mr. Kanakaraj, it is Article 65 of the new Limitation Act (corresponding to Article 144 of the old Act), that would govern the situation of the case. To buttress his argument, the learned counsel placed reliance on *Ananthan* v. *Krishna Pillai*[1] and *Prithi Nath Singh* v. *Suraj Ahir*[2]. On going through the judgments in those cases, I find that they deal with different situations and have nothing in common with the facts of the present case. The *Travancore-Cochin case*[1] was one where a mortgagor under a usufructuary mortgage paid up the entirety of the mortgage amount and obtained delivery of all the title deeds, but got back possession of only a part of the mortgage security. It was in those circumstances, the Court held that the mortgagee's possession of that portion of the hypotheca which had not been delivered back must be deemed to be adverse to the mortgagor and consequently, a suit filed by the mortgagor beyond twelve years was barred by limitation. The Supreme Court case in *Prithi Nath Singh* v. *Suraj Ahir*[2] related to a matter where the mortgagors had paid up the mortgage money long before the filing of their suit, but had failed to get possession of the property usufructuarily mortgaged. In the suit filed by them long after, they contended that though the mortgage debt had been paid off by them, the mortgage still subsisted as they were entitled to get back the mortgage documents, the possession of the mortgaged property and the reconveyance of the property through Court. It was in those circumstances, the Supreme Court held that where the mortgage money had been received by the mortgagee and thereafter the mortgagee refused to perform the act, he was bound to do, the mortgagors were entitled to enforce their right to get back the mortgage documents, the possession of the mortgaged property etc., but that was a new right and was not to be confused with his right of redemption. From the facts of the instant case, it may be seen that the appellant, standing in the shoes of the mortgagor, had not paid up the mortgage money and neglected to demand recovery of possession. This is a case where, by the operation of law, the debt had become paid up and therefore, the appellant was entitled to prove to the satisfaction of the Court that her case fell within the requirements of Act IV of 1938 as amended by Act XXIV of 1950 and that she was entitled to demand delivery of possession of the mortgaged property. The contention of the first respondent's counsel that from the date the debt was deemed discharged by the operation of law the possession of the respondents must be construed to be adverse to the appellant, is indeed an untenable contention and is opposed to a long catena of decisions. In *Jai Nandan* v. *Umrao Koeri*[1], it was held that a usufructuary mortgagee cannot deny the title of the mortgagor and set up adverse possession unless he actually leaves the holding and enters under a different status. The Supreme Court in *Lilachand* v. *Mallappa*[2], following the decision of the Privy Council in *Khiarajmal* v. *Daim*[3], observed that where the mortgagee comes into possession of the property pursuant to the usufructuary mortgage, his possession has a lawful origin and a mere assertion of an adverse title on his part cannot affect the subsisting equity of redemption of the mortgagors or operate to shorten the period of limitation prescribed for a suit for redemption. Mudholkar, J., held in *Mulchand* v. *Ganga*[4] that by the mere fact of satisfaction of the mortgage-debt the possession of the usufructuary mortgagee would not become adverse to the mortgagor and as such, the mortgagee cannot be said to have excluded the mortgagor from possession from the date of satisfaction of the mortgage. Having regard to these decisions, the respondents cannot be heard to say that from the date of the wiping out of the mortgage debt by the operation of law, their possession had become adverse

1. A.I.R. 1957 Trav.-Co. 145.
2. (1963) 3 S.C.R. 302: A.I.R. 1963 S.C. 1041.

1. A.I.R. 1929 All. 305.
2. 1960 S.C.J. 96: (1960) 1 S.C.R. 693: A.I.R. 1960 S.C. 85.
3. (1905) I.L.R. 32 Cal. 296 (P.C.).
4. A.I.R. 1951 Nag. 366.

to the appellant and therefore the suit filed beyond twelve years was barred by limitation; more so, when there is nothing to show that the respondents had set up hostile title in themselves over the second item of the suit property.

9. At this juncture, it may be recalled that respondents 2 and 3 set up independent title in themselves to the second item of the suit property, but they have not substantiated their claim with reference to any document of title. There is, therefore, no difficulty in holding that the second item of the suit property does belong to the appellant and that she is entitled to recover possession of the same.

10. In a vain bid to sustain the judgments of the Courts below, Mr. Kanakaraj raised a contention that all the heirs of the mortgagees have not been impleaded and on that score the suit should fail. For projecting this contention he placed reliance on *Md. Ismail Maracair* v. *Duraisami*[1], where it was held that a mortgage is one and indivisible in regard to the amount and security and no suit can be filed to enforce a mortgage which entails the disintegration of either of them. But in the instant case, such a plea was not raised before the Courts below and no material was furnished to show that besides respondents 2 and 3 there were other heirs of Solomon Nadar the mortgagee under Exhibit A-9 or Abraham Nadar, the assignee under Exhibit A-11. Admittedly, respondents 2 to 4 alone are in possession of item (2) of the suit property. In such circumstances, the belated attempt of the respondent's counsel to nonsuit the appellant on the ground that the had not impleaded all the heirs of the mortgagee or his assignee cannot be given any recognition.

11. In the result, the appeal will stand allowed in part and the judgments and decrees of the Courts below as regards recovery of possession of item (2) of the suit property, will stand set aside. The appellant's suit will stand decreed in so far as item (2) of the suit property is concerned. No costs. Leave granted.

S.J. *Appeal partly allowed.*

1. (1959) 2 M.L.J. 74 : 71 L.W. 606: I.L.R. (1958) Mad. 1066 : A.I.R. 1958 Mad. 621.

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. S. Kailasam, OCJ., G. Ramanujam and V. Balasubrahmanyan, JJ.*

The Chief Controlling Revenue Authority, Board of Revenue, Madras .. *Petitioner**

v.

State Bank of India, Head Office, First Line Beach, Madras .. *Respondent.*

Stamp Act (II of 1899), sections 2 (14), 56 (2), 57 and 31—Draft document submitted under section 31 for opinion as to proper stamp—Matter referred to High Court for opinion—Reference not valid since section 2 (14) contemplates instrument executed.

To comply with the definition of "instrument" under section 2 (14) of the Stamp Act, the instrument must be executed. [*Para.* 6.]

The Chief Controlling Revenue Authority while dealing with the case referred to it under section 56 (2) as to the amount of duty with which an instrument is chargeable could state a case and refer it to the High Court only if it was an instrument, namely one that was signed. Though under section 57 (1) the Chief Controlling Revenue Authority may state the case referred to it under section 56 and also "otherwise coming to its notice" it can only be cases, that is, documents which are in dispute between the parties. [*Para.* 6.]

Cases referred to:—

Marine Insurance Policies, In re A.I.R. 1929 Cal. 799; *In the matter of Thomson Policy*, (1877) I.L.R. 3 Cal. 347; *Reference under the Stamp Act*, In re, (1902) I.L.R. 25 Mad. 752; *Stamp Reference*, In re, (1915) I.L.R. 37 All. 125; *Usuf Dadabhai* v. *Chand Mohamed*, A.I.R. 1926 Bom. 51; *Income-tax Commissioner* v. *Sevugan*, (1948) 1 M.L.J. 157 : 61 L.W. 154 : I.L.R. (1949) Mad. 8 : A.I.R. 1948 Mad. 418.

* Referred Case No. 3 of 1974. 1st *April*, 1976.

Case referred to the High Court under section 57 of the Indian Stamp Act, 1899 by the Chief Controlling Revenue Authority, Board of Revenue, Madras, to answer the following point of law "whether the document styled as 'deed of transfer' between the State Bank of India and the State Bank of Travancore by which the State Bank of India has agreed with the State Bank of Travancore to transfer to the State Bank of Travancore, a sum of Rs. 50,00,000 out of the sum of Rs. 90 lakhs outstanding and due to the State Bank of India by a company called XYZ Company Ltd., on the terms and conditions and consideration mentioned in the said document, is an exchange of property chargeable under Act XXXI of the Indian Stamp Act, or a transfer chargeable under Article 62 (*c*) (*ii*) of the Indian Stamp Act, or any other article under the Indian Stamp Act."

Additional Government Pleader II, for Petitioner.

S. Ramasubramanian, for *King and Partridge* for Respondent.

The Judgment of the Court was delivered by

P. S. Kailasam, *OCJ.*—This is a reference under section 57 of the Indian Stamp Act by the Chief Controlling Revenue Authority, Board of Revenue, Madras. The Respondent, the State Bank of India, presented on 15th November, 1971 three draft documents, but we are concerned with only one for adjudication and levy of proper stamp duty under section 31 of the Indian Stamp Act. The document with which we are concerned is a draft document styled as a deed of transfer proposed to be executed by the State Bank of India and the State Bank of Travancore by which the State Bank of India had agreed to transfer a sum of Rs. 50 lakhs to the State Bank of Travancore in view of cash credit advance sanctioned to XYZ Company Limited, called the 'borrower' under a hypothecation agreement dated 1st November, 1971 executed by the borrower in favour of the State Bank of India hypothecating the goods mentioned in the hypothecation agreement executed in favour of the State Bank of India as security for the repayment of the loan. At the time the deed of transfer was sought to be executed, a sum of Rs. 90 lakhs was due by the borrower to the State Bank of India under the hypothecation agreement. By the said deed of transfer which was sought to be adjudicated, the State Bank of India agreed with the State Bank of Tranvancore to transfer to the said Bank a sum of Rs. 50 lakhs out of the said sum outstanding and due to itself by the borrower and the interest which will thereafter accrue at the rate of 2% above the State Bank of India advance rate of 10½% per annum, with all the rights, benefits, advantages and facilities relating to the proportionate part of the aforesaid security as mentioned in the deed of transfer. The Collector was of the opinion that the document being for the transfer and re-transfer of money respectively would be chargeable under Article 62 (*c*) (*ii*) of Schedule I to the Indian Stamp Act and that a sum of Rs. 22.50 would be leviable on each document. He was also of the opinion that if it were otherwise, the documents would have to be treated as agreements under Article 5 (*c*) of Schedule I of the Stamp Act and the stamp duty chargeable would be only Rs. 2.25. As the Collector had some doubts, he referred the matter to the Board of Revenue and the Board of Revenue informed the Collector that the document would fall under Article 31 of Schedule I of the Indian Stamp Act. Acting on the instructions issued by the Board of Revenue the Collector by his proceedings dated 22nd May, 1972 adjudicated the document as an exchange deed under Article 31 and directed that a stamp duty of Rs. 2,25,000 plus surcharge of 2½% which came to Rs. 5,625, totalling in all a sum of Rs. 2,30,625 had to be paid; on receipt of this order, the State Bank of India filed an application for referring the matter to the High Court under section 57 of the Act for a decision. Accordingly, the Board has made this reference in the following terms:—

"Whether the document styled as 'deed of transfer' between the State Bank of India and the State Bank of Travancore by which the State Bank

of India has agreed with the State Bank of Travancore to transfer to the State Bank of Travancore a sum of Rs. 50,00,000 out of the sum of Rs. 90 lakhs outstanding and due to the State Bank of India by a company called XYZ Company, Ltd. on the terms and conditions and considera-tion mentioned in the said document, is an exchange of property chargeable under Article 31 of the Indian Stamp Act, or a transfer chargeable under Article 62 (*c*) (*ii*) of the Indian Stamp Act, or any other Article under the Indian Stamp Act?"

2. Before answering the reference, it is necessary to consider the several provisions of the Stamp Act to determine whether the reference is competent at all as there is no case arising which can be referred to the High Court.

3. The power to adjudicate as to proper stamp is conferred on the Collector under sections 31 and 32 of the Act. Section 31 enables a party to bring before the Collector any instrument whether executed or not, and whether previously stamped or not, for his opinion as to the duty that is chargeable. On payment of a fee, the Collector is required to determine the duty with which in his judgment, the instrument is chargeable. Section 32 enables the Collector to determine, when an instrument is presented under section 31 and to certify by an endorsement on the instrument, the full duty with which it is chargeable and, if it had been paid, to make an endorsement to that effect on such instrument. If the instrument is not chargeable with any duty, he can certify in that manner. Section 32 also states the consequences of such an endorsement made by the Collector.

4. The important section with which we are concerned is section 56. That section empowers the Collector to make a reference under certain circumstances to the Chief Controlling Revenue Authority.

Section 56 (2) provides that

"if any Collector, acting under section 31, section 40, or section 41, feels doubt as to the amount of duty with which any instrument is chargeable he may draw up a statement of the case and refer it, with his own opinion thereon, for the decision of the Chief Controlling Revenue Authority."

5. Section 56 (3) enables the Authority to consider the case and send a copy of its decision to the Collector, who shall proceed to assess and charge the duty, if any, in conformity with such decision. The right to state a case and refer it to the High Court is conferred on the Chief Controlling Revenue Authority under section 57 of the Act. That section enables the Chief Controlling Revenue Authority to state a case referred to it under section 56 (2), or otherwise coming to its notice, and refer such case with its opinion thereon to the High Court. Section 59 empowers the High Court to deliver its judgment containing the grounds for such decision and to send to the Revenue Authority a copy of its judgment under the seal of the Court and the signature of the Registrar. On receipt of such judgment, the Revenue Authority shall dispose of the case conformably to such judgment.

6. The reference by the Collector to the Chief Controlling Revenue Authority is under section 56 (2). It may be noted that the Collector can refer, while acting under sections 31, 40 and 41. We have also referred to section 31, which enables the Collector to receive any instrument whether executed or not and whether previously stamped or not and to determine the duty that is payable on such an instrument. It may be noted that, under section 2 (14) of the Act an instrument includes every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded. To comply with the definition, the instrument must be executed. Though for the purpose of section 31, an instrument whether executed or not could be received by the Collector for determining the duty, we have the word instrument defined in the Act and it would be understood in the manner in which it is defined. Though under section 56 it is provided that if the Collector acting under section 31 feels any doubt as to the

amount of duty, he may draw up a statement of the case, the restriction is apparent as he can only send any instrument which is chargeable and in construing the instrument, we have to apply the definition, that is the document should have been signed by the concerned parties. Otherwise, even though the document would be one under section 31 and the Collector can determine the duty with which it is chargeable, it may not be one under section 56 (2) to enable him to send it for the decision of the Chief Controlling Revenue Authority. Equally, the Chief Controlling Revenue Authority, while dealing with the case referred to under section 56 (2) can state a case and refer it to the High Court only if it is an instrument, namely one that is signed. Though section 57 (1) says that the Chief Controlling Revenue Authority may state a case referred to it under section 56 and also 'otherwise coming to its notice', it can only be cases, that is, documents which are in dispute between the parties. It is also made clear by section 59 that the High Court should deliver a judgment and that the Revenue authority should dispose of the case in conformity with that judgment. All these provisions clearly contemplate a case before the Court and a document which has been executed by the parties.

7. We are supported in our view by the decision of the Special Bench of the Calcutta High Court in In re *Marine Insurance Policies*[1]. There, the Board of Revenue, Bengal, referred to the opinion of the Court as to whether a certain type of document represented by a blank form attached to the statement of the case drawn up by the Board of Revenue should be stamped with duty payable under Art. 47 (A) (1) (ii), Schedule I, of the Stamp Act, or with duty under Article 62 (*c*) of the said Schedule or with some other and what duty. The Court observed that without taking steps with reference to any particular document or seeking to make any person liable for duty upon any particular document, the Board of Revenue, Bengal, have attached to their case stated a specimen blank form of certificate and have asked for the opinion of the Court under section 57 of the Act upon the question whether documents of the character disclosed by the blank form are liable to stamp duty, and if so, under what heading. The Special Bench held that the reference is entirely incompetent as it is not within the purview of section 57 of the Stamp Act. It observed that that section did not provide a means by which the authorities concerned in collecting stamp duty could get advice from the Court by laying a case before it for the decision of a general question and pointed out that it provided the machinery by which, when an actual case was being dealt with a particular instrument being in question and a particular party being sought to be charged with duty upon that instrument, a question of doubt might be referred to the Court by the revenue authority setting forth the facts in the form of a case stated. The learned Judges observed that "in the ordinary way, if the Government desires legal advice upon a general question it can obtain it by consulting the law officers of the State." After referring to sections 31, 40, 41, 56 and 57 Rankin, CJ. observed thus :—

> "It is quite clear that .... there must be a specific case, definite document, a definite person who is sought to be charged with duty—not an abstract question of chargeability of documents of a certain kind .... it is quite clear that the revenue authority on receiving the judgment of the Court has to dispose of the case conformably to the High Court judgment."

The Special Bench referred to the decisions in In the matter of *Thomson Policy*[1], *Re : Reference under Stamp Act*[2], *Re : Stamp Reference*[3] and *Usuf Dadabhai* v. *Chand Mohomed*[4] and held that the reference was incompetent. It will be sufficient if we refer to the Full Bench decision of the Allahabad High Court, *In Re : Stamp Reference*[3]. The Court observed :

> "........ the reference made to us does not refer to a particular deed in

1. A.I.R. 1929 Cal. 799.

1. (1877) I.L.R. 3 Cal. 347.
2. (1902) I.L.R. 25 Mad. 752.
3. (1915) I.L.R. 37 All. 125.
4. A.I.R. 1926 Bom. 51.

existence, but to some deed which may or may not hereafter come into existence. Section 56 of the Stamp Act confers upon this Court power to deal with instruments which are already in existence and which have been made the subject of action by the Collector acting under sections 31, 40 and 41 of Act No. II of 1899......... We are of opinion that section 57 contemplates a decision being given under circumstances and upon documents of the same nature as those referred to in section 56 of the Act."

We may add that the instrument that is referred to in section 56 (2) is only an instrument that is executed, though under section 31 an instrument which is not executed is also specifically included as being presentable. We find that this reference is totally incompetent.

8. It is also settled law that when an incompetent reference is made, the Court is not bound to answer it, as held in *Income-tax Commissioner* v. *Sevugan*[1]. In a reference made under the Income-tax Act, it was contended on behalf of the Income-tax Commissioner that when a case had been stated by the Tribunal to this Court containing a question, this Court had no province other than to express its opinion and to give its answer to the question and that it could not consider the correctness or otherwise of the reference by the Appellate Tribunal. This contention was negatived and it was held that if the Tribunal improperly or incorrectly made a reference in violation of the provisions of the statute, this Court was capable of entertaining an objection to the statement of the case and if it came to the conclusion that it never should have been stated, the Court was not compelled to express an opinion upon the question referred.

9. We return the reference without answering the same.

S.J. *Reference returned.*

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1. (1948) 1 M.L.J. 157 : 61 L.W. 154 : I.L.R. (1949) Mad. 8 : A.I.R. 1948 Mad. 418.

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. S. Kailasam, CJ., G. Ramanujam and V. Balasubrahmanyan, JJ.*

The Chief Controlling Revenue Authority, Board of Revenue, Madras .. *Petitioner**

v.

Dr. K. Manjunatha Rai .. *Respondent.*

Stamp Act (II of 1899), sections 31, 32—Reference—Release deed—Draft submitted to the Collector for opinion—Stamp affixed later—Document impounded by Sub-Registrar as insufficiently stamped—Whether correct—Scope of sections 31 and 32—Release explained—Terms of the document not to be ignored.

The Collector's determination under section 31 of the Stamp Act as to the stamp duty payable on an instrument would be final and conclusive only in cases where the Collector followed up his order under section 31 by a relative endorsement on the instrument itself under section 32 to the effect that proper duty had been fully paid, or in cases where he had expressed the opinion that no duty was payable, made an endorsement to that effect on the instrument itself. Where, however, the Collector had not certified by endorsement on the instrument either in terms of section 32 (1) or in terms of section 32 (2), his adjudication as to stamp duty on the instrument brought before him under section 31 could not be a bar to other Authorities competent under the Stamp Act to examine or re-examine the question of proper stamp duty paid on it.

[*Para.* 9.]

A release, in law, might be effected either for consideration or for no consideration. In either case, if the transaction operated as a relinquishment or a renunciation of a claim by one person against another or against a specified property it would be a release. The stamp duty on a release, under the Stamp Act, does not depend upon the question of consideration or

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* R.C. No. 2 of 1974. 15*th April,* 1976.

absence of consideration for the release. On the contrary it is made to depend on the value of the claim which was renounced by the releasor. [*Para.* 13.]

The revenue authorities could not ignore the terms of the document which was before them for adjudication and base their decision on the terms of some other collateral instrument. [*Para.* 14.]

Cases referred to:—

Manjunatha v. *Board of Revenue*, (1973) 1 M.L.J. 390 : 86 L.W. 571 : A.I.R. 1973 Mad. 343 ; *Stamp Act, in Re*, (1902) I.L.R. 25 Mad. 752 ; *Government of Uttar Pradesh* v. *Mohammad Amir Ahmad Khan*, (1962) 1 M.L.J. (S.C.) 170 : (1962) 1 An.W.R. (S.C.) 170 : (1962) 1 S.C.J 436 : (1962) 1 S.C.R. 97 : (1961) An.L.T. 436 : A.I.R. 1961 S.C. 787 ; *Raja Mohammed* v. *Deputy Commissioner*, (1956) A.L.J. 220 : A.I.R. 1956 All. 453 ; *Murugayya Pillai* v. *Rajagopal Pillai*, (1942) 1 M.L.J. 325 : 55 L.W. 156 : A.I.R. 1942 Mad. 381.

Case referred by the Chief Controlling Revenue Authority, Board of Revenue, Madras under section 57 of the Indian Stamp Act, 1899, for decision on the following question of law *viz* :—

1. Whether the District Registrar Madras was competent to reopen an adjudication made by the Collector of Madras of the instrument, dated 29th April, 1970 executed by the respondent and

2. Whether on the facts and circumstances of the case the instrument, dated 29th April, 1970 executed by the respondent in favour of his wife was a release deed chargeable to stamp duty under Article 55 (*b*) of Schedule 1 of the Stamp Act or a conveyance chargeable under Article 23 of Schedule 1 of the Stamp Act.

V. Manivannan, Additional Government Pleader II, for Petitioner.

T. Raghavan and *T. K. Seshadri*, for Respondents.

The Order of the Court was made by

Balasubrahmanyan, J.—This is a reference made by the Board of Revenue, Madras under section 57 of the Indian Stamp Act, pursuant to a *mandamus* issued by this Court in Writ Petition No. 2484 of 1971, reported in *Manjunatha* v. *Board of Revenue*[1]. The reference concerns an instrument bearing the date 29th April, 1970, under which the respondent, Manjunatha Rai purported to release in favour of his wife a piece of land which stood in his name.

2. The statement of the case shows that before stamping the instrument the respondent took it to the Collector of Madras and sought his opinion as to the proper stamp duty payable thereon. The Collector went into the matter and, by his order, dated 21st April, 1970, considered the document to be a release deed and determined the stamp duty payable at Rs. 22.50. On getting the Collector's opinion the respondent stamped the instrument as a release deed with Rs. 22.50, and presented the document for registration before the sub-Registrar of Assurances, Madras-1. The Sub-Registrar however, impounded the document as insufficiently stamped in the view that it was a conveyance, and not a release as determined by the Collector. On further reference, the District Registrar agreed with the view of the Sub-Registrar, and held that the document was a conveyance of land effected by the respondent to his wife, chargeable to stamp duty as such on the basis of the market value of the property. The District Registrar estimated the market value at Rs. 91,870 and levied a stamp duty of Rs. 5,617.50. He also imposed a nominal penalty of Rs. 5. The respondent appealed to the Board of Revenue, contending that the registering authorities had no jurisdiction to re-adjudicate the stamp duty when the Collector had already gone into the matter and had expressed his determination as to the proper stamp duty payable. The respondent urged that, right or wrong, the Collector's determination under section 31 was final and conclusive and no other authority functioning under the Act had power to go behind that determination and hold that the document stamped, in accordance with the Collector's opinion was not fully stamped. The respondent further urged that, on any consideration, the document must be held to be a release deed. The Board of Revenue rejected all these contentions.

1. (1973) 1 M.L.J. 390 : 86 L.W. 571 : A.I.R. 1973 Mad. 343.

3. The first question before us in this reference is whether the Collector's determination under section 31 of the Stamp Act is final and conclusive, or whether it is open to the registering authorities to independently enter into an adjudication of the stamp duty on the instrument, notwithstanding the earlier opinion of the Collector ? The question calls for a consideration of the relevant provisions of section 31 and section 32 of the Stamp Act. Section 31 (1) provides that when an instrument, whether executed or not and whether previously stamped or not, is brought to the Collector, and the person bringing it pays the requisite fee and applies to have the opinion of the Collector, as to the duty, if any with which it is chargeable, the Collector shall determine the duty, if any, with which in his judgment, the instrument is chargeable. So far as is relevant to the present discussion, it will be found that section 31 (1) deals with two kinds of instruments, those that are previously stamped, on the one hand, and those that are not previously stamped, on the other. The opinion of the Collector on stamp duty on the instrument may be solicited in respect of both kinds of instruments and in either case the Collector is bound to render his determination. Section 32 (1) says that when, on the basis of the opinion expressed by him under section 31, the Collector finds that the instrument is already fully stamped or he finds that the duty determined by him under section 31 has been paid, he shall certify, by endorsement on the instrument, that the full duty (stating the amount) has been paid on the instrument. Section 32 (3) provides, *inter alia* that any instrument upon which an endorsement has been made by the Collector under section 32 (1) "shall be deemed to be duly stamped", and shall be receivable in evidence, and may be acted upon and registered as if it had always been duly stamped. Apparently, it was this deeming provision in section 32 (3) that the respondent relied upon in support of his contention that the registering authorities had no jurisdiction in this case to re-adjudicate the question of stamp duty when the Collector had already determined it under section 31. It has, therefore, to be seen whether section 32 (3) applies to this case and has the effect contended for by the respondent. It may be mentioned that no other statutory provision was referred to during arguments.

4. In the present case, the respondent's document was considered and adjudicated upon by the Collector as respects stamp duty only under section 31. But, at the time it was brought before the Collector for his opinion, the instrument had not been previously stamped. It remained unstamped when he passed the order, dated 21st April, 1970 to the effect that the document was a release and must bear a duty of Rs. 22.50. Pursuant to the Collector's opinion, the respondent proceeded to stamp the instrument with a duty of Rs. 22.50. But, after stamping the instrument, the respondent did not submit it to the Collector for an endorsement of the certificate as to the payment of the duty in accordance with the opinion earlier expressed. Instead, the respondent straightway presented the stamped instrument for registration. So at the time of presentation to the Sub-Registrar, the instrument did not bear on it any certificate from the Collector to the effect that the full duty had been paid. It is in this factual situation that the applicability of section 32 (3) will have to be examined. It seems to us that for this provision to operate in favour of any given instrument the Collector's adjudication under section 31 must be followed up by a relative certificate by the Collector endorsed on the instrument itself, to the effect that the full duty as adjudicated by him has in fact been paid on the instrument. What makes the adjudication by the Collector as to stamp duty on an instrument final and conclusive is not the opinion which he expresses under section 31, but his adjudication under that section followed by a certificate entered by him under section 32 (1) on the instrument itself to the effect that the full duty has been paid on it. A mere opinion of the Collector under section 31 on an unstamped instrument not followed by certification under section 32, which was what happened in the present case, is not covered by the rule of finality enacted in section 32 (3) of the Act.

5. Reference was made at the Bar to the decision of a Special Bench of this Court

reported as *Reference under section* 57 *of the Stamp Act*[1]. That was a case where the Collector in exercise of his power under section 31 had determined the duty with which two instruments were chargeable. Following his determination, the Collector had also endorsed on the instruments—certificates as to payment of duty, which he was empowered to make under section 32. In those circumstances, the Court held that the Collector's adjudication as to stamp duty was final and conclusive and the Board of Revenue had no jurisdiction even to refer the question for the opinion of the High Court under section 57 of the Act. The learned Judges held that the High Court had no power to adjudicate on the matter, because any opinion rendered by it under section 57 would necessarily have to be followed up under section 59 (2) and the revenue authorities had to pass consequential orders in conformity with the High Court's judgment. But this they would not do in view of section 32 which made the determination by the Collector, duly endorsed on the instrument, final in respect of that instrument.

6. A close examination of the judgment in the above case would show that what makes the Collector's determination final is the endorsement made by him on the instrument under section 32 and not the adjudication as to stamp considered in itself. Following the principle of this decision, another case was decided by the same Full Bench, reported in the same volume (*Reference under section* 57 *of the Stamp Act*)[1] in which the Collector's certificate under section 40 (1) (*a*) of the Stamp Act was held to be final and conclusive, not capable of revision by the Board of Revenue nor capable of being considered on reference by the High Court. The judgment of the majority of the Full Bench in this later case shows that the Board of Revenue could exercise its powers as the chief controlling revenue authority at any stage prior to the Collector's making a certificate under section 40 (1) (*b*), but not after the certificate has once been endorsed on the instrument; vide judgments of Bashyam Iyengar and Moore, JJ. at pages 760 to 766.

1. (1902) I.L.R. 25 Mad. 752. (F.B.).

7. Under the scheme of the Stamp Act, the Collector's powers under section 31 and section 32 would seem to be distinct and separate both in point of time and in point of procedure. The one deals with the expression of opinion as to stamp duty liability, whereas the other deals with—certification of payment of full duty. The power of the Collector under section 31 begins and ends with opinion—giving. It might even be said that with reference to his duties under section 31, he becomes *functus officio* the moment he delivers his opinion. Then follows section 32, but the Collector does not properly enter upon his task under this section unless the person executing the document produces it before him for certification.

8. The distinction between sections 31 and 32 is well brought out in a case before the Supreme Court reported in *Government of Uttar Pradesh* v. *Mohammad Amir Ahmed Khan*[1]. There a stamped document, recording the terms of an oral wakf, was submitted to the Collector, and his opinion was solicited as to the proper stamp duty payable thereon. After some delay, the Collector expressed his opinion that it should bear a stamp of Rs. 85,598 and proceeded to demand the payment of the duty. On failure by the executant of the instrument to pay the duty within the time limited the Collector impounded the document, purporting to do so in exercise of his powers under section 33 of the Act. On a writ petition filed by the executant of the instrument, a Full Bench of the Allahabad High Court held in *Raja Mohammed* v. *Deputy Commissioner, Sitapur* (*F.B.*)[2], that the Collector, acting under section 31, had no jurisdiction to impound the instrument under section 33. On appeal by the State Government, the Supreme Court affirmed the decision of the Allahabad High Court. The following observations of Kapur, J., speaking for the Supreme Court, are pertinent for the purposes of the present case :

"The scheme of the Act shows that where a person is simply seeking the

1. (1961) A.L.T. 436: (1962) 1 M.L.J. (S.C.) 170: (1962) 1 An.W.R. (S.C.) 170: (1962) 1 S.C.J. 436: (1962) 1 S.C.R. 97 : A.I.R. 1961 S.C. 787.
2. (1956) A.L.J. 220: A.I.R. 1956 All. 453. (F.B).

opinion of the Collector as to the proper duty in regard to an instrument, he approaches him under section 31. If it is properly stamped and the person executing the document wants to proceed with effectuating the document or using it for the purposes of evidence, he is to make up the duty and under section 32, the Collector will then make an endorsement and the instrument will be treated as if it was duly stamped from the very beginning. But if he does not want to proceed any further than seeking the determination of the duty payable, then no consequence will follow and an executed document is in the same position as an instrument which is unexecuted and unstamped, and after the determination of the duty the Collector becomes *functus officio* and the provisions of section 33 will have no application. The provisions of that section are a subsequent stage when something more than mere asking of the opinion of the Collector is to be done."

In an earlier passage in the same judgment, Kapur, J., observed:

" They (the words of section 33) do not cover the acts which fall within the scope of section 31, because that section is complete by itself, and it ends by saying that the Collector shall determine the duty with which, in his judgment, the instrument is chargeable at all....when he is asked to give his opinion, he has to determine the duty, with which, in his judgment, the instrument is chargeable, and there his duties and powers in regard to that matter end. The follows section 32......"

An early decision of a learned Judge of this Court, Horwill, J., in *Murugayya Pillai* v. *Rajagopal Pillai*[1], rules that a mere letter from the Collector expressing his opinion that no stamp duty was necessary is not the certificate referred to in section 32 (2) of the Stamp Act and hence not binding on the civil Court.

9. On the basis of the above rulings, the legal position may be summed up thus : The Collector's determination under section 31 of the Stamp Act as to the Stamp duty payable on an instrument would be final and conclusive only in cases where the Collector follows up his adjudication under section 31 by a relative endorsement on the instrument itself under section 32 to the effect that proper duty has been fully paid, or, in cases where he has expressed the opinion that no duty is payable, makes an endorsement to that effect on the instrument itself. Where, however, the Collector has not certified by endorsement on the instrument either in terms of section 32 (1) or in terms of section 32 (2) his adjudication as to stamp duty on the instrument brought before him under section 31 cannot be a bar to other Authorities competent under the Stamp Act to examine or re-examine the question of proper stamp duty paid on it.

10. As already stated, the respondent in the present case did not obtain a certificate of endorsement from the Collector in terms of section 32 (1) within one month of the date of execution of the document or at any time after he obtained the Collector's adjudication under section 31. This being so, when the document was later presented for purpose of registration, the registering authorities had not only the requisite jurisdiction, but a positive duty, to adjudicate on the proper stamp duty payable on the respondent's instrument. Our answer to the first question in the reference is, therefore, in the affirmative and against the respondent.

11. This leads us to the other question, whether the instrument executed by the respondent on 29th April, 1970 in favour of his wife is a deed of release or a conveyance. For considering this question, the language of the document has to be examined as to its real tenor. The deed is described as a Deed of Release (Relinquishment). It is executed by the respondent Manjunatha Rai in favour of his wife Lalitha Rai. The instrument recites that on 14th March, 1947 the respondent had purchased three items of vacant land, covered by door No. 110, Mount Road, Vellala Teynampet, Madras for Rs. 1,22,500. The instrument further recites that since the respondent was unable to pay the entire purchase consideration he borrowed a sum of Rs. 90,000

1. (1942) 1 M.L.J. 325 : 55 L.W. 156 : A.I.R. 1942 Mad. 381.

from the Vijaya Bank. The borrowing was a joint borrowing by himself and his wife. The mulki properties of the wife consisting of agricultural lands were offered as security to the Vijaya Bank. Besides, the Bank was given other personal securities both of the respondent and his wife. The instrument proceeds to recite that subsequent to the purchase of the property in No. 110, Mount Road, the respondent's wife borrowed a sum of Rs. 30,000 from her sister on 30th July, 1949 and utilized the same for discharging a portion of the debt due by both of them to Vijaya Bank. The balance of Rs. 60,000 owed to the Bank jointly by the respondent and his wife was subsequently discharged out of the proceeds, again, of a joint borrowing by the respondent and his wife from the Indian Bank. Apart from the property bearing door No. 110, Mount Road, purchased in the manner aforesaid, certain adjacent lands were acquired by the respondent and his wife by way of assignment from the Government of Madras in the year 1954. The instrument of release clearly recites that even at the time of the original purchase of the property in 1947, it was agreed between the husband and wife that out of the total area of 27 grounds, a block of the extent of 10 grounds should be taken by the wife for her own exclusive benefit. It would further appear from the recitals made in the instrument that this agreement between them was also actually implemented, when the wife took possession of a portion of the land, had it subdivided as No. 110/1, Mount Road and put up a building thereon in 1954-55 at her own cost. The wife had ever since been in possession and enjoyment of door No. 110/1 paying assessment and taxes herself and leasing the property and enjoying the rents and profits therefrom. The occasion for the execution of the release deed by the respondent in favour of his wife was stated to be that the latter wished to regularize her title to her portion of the property which she has been enjoying for several years in her own right. The respondent was equally desirous of acceding to his wife's request in view of the fact that the nominal title under the sale deed stood solely in his name. Upon these recitals the deed of release declared that the releasor had no claim or interest in the site specified in the schedule attached to the deed. The schedule carried a description, in detail of the sub-division of the property bearing door No. 110/1, Mount Road, Madras.

12. A "release", as defined in Article 55 of Schedule I to the Stamp Act, is "any instrument—whereby a person renounces a claim upon another person or against any specified property." A plain reading of the document in question in this case does not admit of any doubt as to the nature of the transaction. We are satisfied that it is a release, pure and simple. This conclusion must fairly stem from the recitals contained in the deed. It is true that the original purchase of the property of the extent of 27 grounds under the deed, dated 14th March, 1947 was not in the joint names of the parties; nor stated to by for the joint benefit of both the husband and the wife. But we cannot brush aside the clear recital in the release deed that even at the time of the original purchase it was agreed between the husband and wife that 10 out of the 27 grounds were for the latter's benefit. That this could have been the intention is shown by the fact that a better part of the purchase consideration of the property was borrowed on the joint credit of both the respondent and his wife, first from the Vijaya Bank and later from the Indian Bank. Besides, the wife and repaid Rs. 30,000 from resources found by her alone. In these circumstances, there could be no doubt that even from the start the respondent and his wife were co-owners of the property, and it was only as such co-owner that the wife subsequently proceeded to raise superstructures on a portion of the property at her own cost; thereafter enjoying the income from the property and paying the taxes herself.

13. The District Registrar as well as the Board of Revenue regarded the document as a conveyance from the respondent to his wife, and spelt out the — consideration therefor to be Rs. 30,000. The inference as to consideration was apparently drawn from the recital that the respondent's wife had partially discharged the Vijaya Bank loan to the extent of Rs. 30,000. The instrument of release also carried a statement, written under-

neath the schedule, to the effect that the respondent had obtained consideration for the release in the sum of Rs. 30,000 from his wife in 1947. In our view, however, this statement in the release deed does not have the effect of rendering the transaction as a conveyance. For a release, in law, may be effected either for consideration or for no consideration. In either case, if the transaction operates as a relinquishment or a renunciation of a claim by one person against another or against a specified property, it will be a release. The stamp duty on a release, under the Stamp Act, does not depend upon the question of consideration or absence of consideration for the release. On the contrary it is made to depend on the value of the claim which is renounced by the releasor.

14. For holding that the document in question is a conveyance the Board of Revenue did not rely so much on the recitals which that document contained. The Board embarked, instead, on an examination of the original sale deed, dated 14th March, 1947 under which the respondent purchased the whole extent of 27 grounds in Mount Road. According to the Board, this document, dated 14th March, 1947 did not say that the consideration for the purchase of the property was, in part, provided by the wife. The Board expected that such a recital ought to have been put in the purchase document, if the intention had been that the purchase was to be for the joint benefit of both husband and wife. From this the Board purported to draw the inference that the respondent alone was the sole purchaser of the entire extent of the property of 27 grounds. From this it was but a short hop for the Board's conclusion that what the respondent did under the document, dated 29th April, 1970 was only to part with, or transfer, a portion of his own property in favour of his wife. We do not subscribe to the method of adjudication of stamp duty which the Board had followed in this case. It is true that what name the parties choose to give to an instrument cannot be decisive, or even indicative, of the true nature of the instrument for purposes of stamp duty. But this rule does not mean that the revenue is empowered to go behind the recitals and terms of the document before it and hold that the object of the transaction was something different from what the document discloses and therefore the document should be deemed to be that which it is not. We do not think that the revenue authorities can ignore the terms of the document which is before them for adjudication and base their decision on the terms of some other collateral instrument. At all events, even according to the Board, the purchase document, dated 14th March, 1947 was silent as to how and where the purchaser farmed the consideration which he passed to the vendor. In this situation, the release deed dated 29th April, 1970 was the only instrument to which the Board should have riveted its attention. It was not open to the Board to question the recitals in the release deed in the absence of any materials to the contrary. The same remark must apply to the Board's observation that the assignment by the Government of the adjacent property in favour of the respondent did not show that it was obtained for the benefit of the respondent and his wife jointly. We do not also subscribe to the view that the respondent's wife was merely in the position of a lender of moneys with reference to a portion of the consideration that went in for purchase of the property. We hold that the respondent's wife had acquired a joint interest along with him in the property, and the appropriate method by which the respondent could renounce his claim over the interest of his wife was by execution in her favour of a release, as had been done under the document, dated 29th April, 1970.

15. In view of these consideration, we hold that the instrument was rightly charged to duty as a release under Article 55 (*b*) of Schedule I to the Stamp Act. We answer the reference accordingly. There will be no order as to costs.

S.J. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, CJ.* and *S. Natarajan, J.*

The United Commercial Bank Limited and others ... *Appellants**

v.

Reliable Hire Purchase Co., Private Ltd., and others .. *Respondents.*

Negotiable Instruments Act (XXVI of 1881), section 10—Banker and Customer—Suit for recovery of money—Cheque issued by plaintiff—Endorsement forged—Cheque honoured by bank—Duty and responsibility of bank.

Reliable Hire Purchase Co., Ltd., the plaintiff issued a crossed cheque in favour of S.M. Ltd. and gave it to one *R.* The cheque was drawn on the 1st defendant bank. *R* forged an endorsement in favour of M and Co. of which he was a director, as if by S.M. Ltd., on the cheque and gave it for collection to the 2nd defendant bank. The collection was duly made. Before the cheque was sent to the clearing house, the endorsements on the reverse of the cheque were guaranteed by the second defendant. On the failure of the endorsee the true facts came to light. The plaintiff filed a suit against first and second defendants-banks for recovery of the money from either or both of them. The trial Court decreed the suit against the 1st and 2nd defendant. On appeal by the 1st and 2nd defendants, *Held:* In the instant case in view of the guarantee given by the 2nd defendant and appearing on the reverse of the cheque as to the reliability of the endorsement, the first defendant could *prima facie* accept it and there was no failure on the part of the 1st defendant to make enquiry which the circumstances called for. On that ground, the decree against the 1st defendant was not sustained.

[*Para.* 2.]

In the light of the circumsstances, the obligation on the part of the second defendant to clarify itself was not fulfilled. In the circumstances, it could not be held that the 2nd defendant had shown that it acted in good faith and without negligence in making the collection on the basis of the guarantee of the forged endorsements. The decree was upheld against the second defendant.

[*Para.* 6.]

Cases referred to:—

United Australia Ltd. v. *Barclaes Bank Ltd.*, (1941) A.C. 1; *Lloyds Bank Ltd.* v. *E.R. Savory and Co.*, (1933) A.C. 20; *Motor Traders Corporation* v. *Midland Bank*, (1937) 4 All E.R. 90; *Ramulal Premchand* v. *Seth Bank Ltd.*, A.I.R. 1946 Bom. 482; *Lloyds Bank* v. *The Chartered Bank of India, Australia and China*, (1929) 1 K.B. 40.

Appeals under Clause 15 of the Letters Patent and under Order 36, Rule (1) of O.S. Rules against the judgment and Decree of the Honourable Mr. Justice Kunhamed Kutti dated 28th March, 1967 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 32 of 1963 etc.

R. Narasimhachari and *N. Varadarajan,* for Appellants.

L.V. Krishnaswami Iyer, R. Vijayan and *Bhaskaran Shankar,* for Respondents.

The judgment of the Court was delivered by

Veeraswami, CJ.—These appeals, one by the first defendant and the other by the second defendant Banks arise out of the suit instituted by the first respondent for a declaration that moneys paid out on the basis of a cheque issued by it should not be debited to its account and in the alternative for recovery of the amount covered by the cheque and also damages with interest on the former amount from the date of the plaint from the first defendant or the second defendant, or both. The first respondent, Reliable Hire Purchase Co. Private, Ltd., drew up a cheque on the Indian Overseas Bank Limited, as it then was, on 10th November, 1960, for a sum of Rs. 56,000 in favour of Sundaram Motors Private Ltd. One Raman, the Managing Director of Manasuba and Co., Private Ltd., received the cheque with a covering letter addres-

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*O.S.A. Nos. 5 and 38 of 1968. 12th February, 1975.

sed to Sundaram Motors Private Ltd., on the understanding that he would purchase a motor vehicle on a hire purchase basis with that money. But, admittedly, Raman forged an endorsement as if by Sundaram Motors Private Ltd., acting through the Sales Manager and made it payable to Manasuba and Co., Private Ltd. He made a further endorsement as Director for Manasuba and Co., Private Ltd., and forwarded the cheque to the United Commercial Bank, Ltd., as it then was, for collection, which was done the very next day, that is, on 11th November, 1960. Quite some time thereafter, on the failure of Manasuba and Co., Private Ltd., the true facts came to light. The first defendant, the Indian Overseas Bank, having refused to comply with the request of the first respondent to cancel the debit against it in relation to the cheque amount, it filed the suit asking for the reliefs we have mentioned. We may mention that, before sending the cheque to the clearing house, the endorsements on the reverse of the cheque were guaranteed by the United Commercial Bank Ltd., the second defendant. The plaintiff's case was that the first defendant did not act in good faith, but acted negligently in making payment relying upon the guarantee and that, in any case, as the first defendant could enforce the guarantee given by the second defendant, but failed to do it, the first defendant must be directed to pay the amount covered by the cheque to the first respondent. Alternatively the plaintiff also claimed that the second defendant had converted the cheque in collecting the same with its endorsement and was liable to the first respondent as the true owner for damages for such conversion. The total claim made by it was for Rs. 60,200 against both the defendants, or either of them. Kunhamed Kutty, J., who tried the suit, found that the first defendant did not make the payment in due course and was, therefore, liable for the suit claim. On the basis of a third party petition taken out by the first defendant under Order 8-A, Civil Procedure Code, the learned Judge also found that the second defendant acted negligently, and therefore, would be liable to the first defendant for the amount of decree granted against the first defendant.

2. Mr. Narasimhachari, who appears for the second defendant-appellant made several submissions to get rid of his client's liability. The first of them was that the learned Judge was not right in his view that the first defendant's payment for the cheque was not in due course and that the first defendant was entitled to rely on the guarantee by the second defendant endorsed on the cheque. Kunhamed Kutty, J., thought that the payment made by the first defendant was not in due course, because any endorsement on a crossed cheque in favour of one other than the original payee should serve as a red light warning so that there was an obligation on its part to make an enquiry, more especially when the cheque covered such a large sum as Rs. 56,000. We are unable to concur in this view. Section 85 (1) of the Negotiable Instruments Act provides that, where a cheque payable to order purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment in due course. The expression "payment in due course" is defined by section 10 to mean payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned. The question whether the first defendant complied with these requirements will depend on the circumstances in the instant case, the most important one of which is that another well known Bank on behalf of its customer had guaranteed the endorsement. There is no reason why the first defendant should suspect the guarantee which implied that the second defendant had exercised the necessary care and caution and acted in good faith in making the guarantee. If it were otherwise, banking practice would become unrealistic and burdensome and would not tend towards facilitating normal banking business. We do not mean to say that there was no obligation on the first defendant at all irrespective of circumstances to act as expected by section 10 of the Negotiable Instruments Act. But, in the instant case we are satisfied that, in view of the guarantee given by the second defendant which appeared on the

reverse of the cheque as to the reliability of the endorsement, the first defendant would be justified *ex facie* in accepting it and acting on that basis. We are unable to find out that there was any failure on the part of the first defendant to make enquiry which the circumstances called for. On that ground, we do not sustain the decree against the first defendant.

3. Mr. Narasimhachari then contends that, if the first defendant is not liable and the decree against it is set aside inasmuch as the decree as against the second defendant resulted from a third party application, that decree also should be set aside. We are afraid that this result does not necessarily follow. We have already referred to the frame of the suit. The first respondent had prayed far a decree against both the defendants, or one or the other of them, as the Court might deem fit. If we find that the second defendant is independently liable, the technical argument addressed on behalf of the second defendant-appellant loses its force. We may at once state, at this stage for the reasons which will appear hereafter, that, although the decree against the second defendant may not be rested on the basis of the third party petition, it is justifiable on the merits of the first respondent's claim itself and in that view we may well invoke our equitable jurisdiction under Order 41, rule 33 of the Civil Procedure Code, and sustain the decree.

4. What is strenuously pressed on us by Mr. Narasimhachari is that the endorsement made by the second defendant was done in good faith and without negligence. He says that Manasuba & Co., Private Ltd., was known to be a flourishing company of respectability and there was no reason why the second defendant's suspicion should be aroused as to the genuineness of the endorsements. The question, therefore, becomes one of fact as to whether, in the instant case, the second defendant acted in good faith and without negligence.

5. In our opinion, there are circumstances in which if the second defendant had applied its mind it would certainly have aroused suspicion calling for an enquiry as to the genuineness of the endorsement purported to have been made by Sundaram Motors Private Ltd., through its Sales Manager. Normally, when a cheque is drawn in favour of a company and the same is crossed, the payee remits it to its own Bank for collection and then draws on its account for making payment to others. It is not a very usual feature for incorporated companies to endorse cheques drawn in their favour for payment to another company as a mode of payment. Secondly, the cheque covered a large amount, namely, Rs. 56,000. Thirdly, though the cheque was drawn on 10th November, 1960, it was presented for collection probably on the same day or the next day and actually the collection through the clearing house was made on 11th November. The endorsement by Sundaram Motors Private Ltd., as forged appears thus:

"Pay Manasuba & Co., Private Ltd.
FOR SUNDARAM MOTORS PRIVATE LTD.
(Sd.)
SALES MANAGER"

The company's seal was not put there, but we will assume that this is not in every case necessary. The second endorsement ran thus:

"For Manasuba & Co., Private Limited.
(Sd.) Raman
Director".

In contrast, the first endorsement was by the Sales Manager on behalf of Sundaram Motors Private Limited, but the second by the Director on behalf of the company. Whether the Sales Manager of Sundaram Motors Private Ltd., had the authority to act for the company in making endorsements could possibly have raised a query before the second defendant satisfied itself and guaranteed the endorsements. The endorsements also were not dated. There is a further feature and that is this. Manasuba and Co., Private Ltd., was among other things, carrying on business as transport owner. One might ask what was the necessity for Sundaram Motors Private Ltd., to endorse the cheque in favour of Manasuba and Co., Private Ltd., which would not be the usual feature. One other thing is that, as disclosed by the

record of evidence, the officers of the United Commercial Bank possibly knew every one including Raman in Manasuba & Co., Private Ltd. One other circumstance is that even before the first defendant Bank honoured the cheque, the second defendant had credited Manasuba & Co., Ltd., with the amount covered by the cheque. It seems to us that the cumulative effect of all these circumstances is that the second defendant Bank did not take the least precaution to verify the endorsements.

6. It is vehemently contended before us that to lay such a burden on a busy Bank like the second defendant is to impose an impossible obligation in view of the numerous transactions that pass through the Bank every day, and that when the second defendant was satisfied about the respectability of Manasuba & Co., Private Ltd., it was justified in assuming that the endorsement purported to have been made by Sundaram Motors Private Ltd., was a genuine one. Lord Atkin in *United Australia Ltd.* v. *Barclays Bank Ltd.*[1], put it thus:

> "In these days every bank clerk sees the red light when a company's cheque is endorsed by a Company official into an account which is not the company's."

This red light not only applies to cases of companies or persons standing in a fiduciary position, but also to a cheque drawn in favour of an incorporated company, which has purportedly endorsed the cheque in favour of another incorporated company. The reason is that every credit and debit by cheques for or against are normally expected to find a place in the accounts and the usual way by which a company acts is that, when it receives cheques, it also makes payment by cheques and not through endorsements as in this case. Our attention was invited to a few of the decided cases in the United Kingdom, as *Lloyds Bank Ltd.* v. *E.B. Savory and Co.*[2], and *Motor Traders Corporation* v. *Midland Bank*[3]. The second of these cases related to the bad history of the customer of the collecting Bank. The first was a case of a stolen cheque which was received by the London office and sent to the clearing house. The paying-in-slips were sent to the country branch, no mention being made of the names of the drawers. The amounts of the cheque were without question credited as directed by the paying in-slips. Written rules formulated by the bankers for the direction of their manager provided, among other things, that no new current account should be opened without knowledge of, or full enquiry into the circumstances and character of the customers. There was also a rule, not written, but generally recognised, that banks do not take payments in, without enquiry, of cheques drawn by a firm in favour of a third party and paid in by a person other than the payee, who is or ought to be known to be an employee of the drawing firm. In the circumstances, it was held by the House of Lords that the practice of bankers was defective in that the branch which received the cheques in the first instance never informed the crediting branch of the names of the drawers of the cheque, that the managers of the crediting branches had omitted to make sufficient enquiries when accepting *P* and Mrs. *S* as customers and that, in those circumstances the bankers had failed to prove that they had acted without negligence and consequently they were liable. An examination of these and other cases like *Ramulal Premchand* v. *Seth Bank Ltd.*[1], shows that the question of good faith and negligence is a question of fact in the light of the material in each case. In the instant case, we are of opinion, in the light of the circumstances mentioned, that the obligation on the part of the second defendant to clarify itself was not fulfilled. In the circumstances, therefore, we are unable to hold that the second defendant has shown that it acted in good faith and without negligence in making the collection on the basis of the guarantee of the forged endorsements.

7. It is next contended that, even so, the first respondent could not succeed as the company itself had acted negligently

1. (1941) A.C. 1 at 23.
2. (1933) A.C. 20.
3. (1937) 4 All E.R. 90.

1. A.I.R. 1946 Bom. 482.

inasmuch as, for a period of about six months, it kept quiet without enquiring as to what happened to the cheque which it had issued and without verifying whether Manasuba & Co., Pvt. Ltd., has purchased a vehicle, and if so, asking for the certificate in respect of it. But, we are unable to accept this contention, because the first respondent was a financier who would normally have expected Manasuba & Co., Private Limited to have utilised the amount, more especially when the cheque itself was drawn not in favour of Manasuba & Co., Private Limited, but in favour directly of Sundaram Motors Private Limited. Further, Manasuba & Co., Private Ltd., was also fulfilling the terms of the hire-purchase agreement inasmuch as it was remitting to the first respondent the instalments due under that agreement.

8. Another contention of Mr. Narasimhachari is that the first respondent, at any rate, was not the true owner of the cheque within the meaning of section 131 of the Negotiable Instruments Act. In support of this contention our attention was invited to certain observations found at page 665 of the Negotiable Instruments Act by Bhashyam and Adiga, 13th Edition. But, it seems to us that until the cheque was cashed, control in respect thereof continued to remain with the drawer. He could, for instance, instruct his banker before the cashing of the cheque, not to honour it. That can only be on the basis that he still continued to be the owner. The position will not in our opinion be altered by mere endorsement so long as the cheque was not cashed. In that sense therefore, we consider that the first respondent continued to be the true owner of the cheque.

9. The last contention for the second defendant-appellant relates to a sum of Rs. 19,320 paid by Manasuba & Co., Private Ltd., to the first respondent towards the purported hire-purchase transaction. That this sum was paid and credited by the first respondent towards this transaction is admitted. The question is whether this amount can go in reduction of the second defendant's liability. In our opinion, it can, and it should. Strenuously this is objected to by the first respondent, and for this purpose reliance is placed on certain observations in *Lloyds Bank* v. *The Chartered Bank of India Australia and China*[1]. But, we are not persuaded that we should decide this case strictly on a formal basis. In England a great deal of importance is attached to forms, and anything that did not conform to the form would be treated as being outside the scope of the claim. But as we have already indicated, the first respondent has based its claim in the suit not merely on conversion of the cheque, but on other facts as well. Apart from it, when the first respondent has received payment towards the debt covered by the cheque, it would be a case of unjustified enrichment to allow the first respondent to have the benefit of these instalmental payments amounting to Rs. 19,320 and at the same time recover the full amount by the cheque. It may be that there were other transactions between Manasubha & Co., Private Ltd., and the first respondent. But, we are not concerned with the over-all position as between them. Once it is admitted that the sum of Rs. 19,320 was paid in respect of the transaction of hire-purchase, though it never came into existence, to that extent, the second defendant should be relieved of the liability to make good the loss suffered by the first respondent.

10. On that view, we direct that there be a decree against the second defendant and in favour of the first respondent for a sum of Rs. 56,680 with interest at six per cent from the date of the trial Court's decree. As regards costs, taking all the circumstances into account especially the conduct of the first respondent in handing the cheque to the Director of Manasuba & Company Private Ltd., we think that it would be fair and proper to direct that each party should bear its costs at the trial Court, but the second defendant should bear the costs of the first respondent in the related appeal.

11. The appeal of the first defendant is allowed and the appeal for the second defendant is ordered in the manner we have directed.

12. Mr. Ramakrishna for the first defendant-appellant presses for costs. But,

1. (1929) 1 K.B. 40 at 60.

having regard to the fact that both the first and the second defendants are nationalised Banks and also the fact that at least Kunhammed Kutty, J., thought that the first defendant also should be made liable, though we have taken a different view, we do not feel justified in allowing the first defendant's costs.

S.J. — *First defendant's appeal allowed; Second defendant's appeal modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail, J.*

N. Bhaskaran ... *Appellant**

v.

Pa. Sarkarai and others .. *Respondents.*

Madras Indebted Agriculturists (Temporary Relief) Act (V of 1954), section 3—Scope of section—Suit on mortgage—Suit instituted twelve years after mortgage became due—Mortgagee claiming exclusion period under Act V of 1954—Whether tenable.

A mortgage deed dated September, 1952 provided that the amount was payable on the expiry of three years from the date of the mortgage. The suit was filed 12 years thereafter on 15th November, 1967. The mortgagee claimed that the defendants were agriculturists and in computing the period of limitation some period had to be excluded under Madras Act V of 1954. On the validity of this claim,

Held: Section 3 of Madras Act (Madras Indebted Agriculturists (Temporary Relief) Act (V of 1954) was intended to save agriculturists coming within the definition of that term in that Act from being harassed by the filing of suits, and that can apply only to suits which could otherwise be filed during the period of prohibition provided for by the Act. If the creditor did not have a cause of action to file a suit the question of such a suit being prohibited by the Act, did not arise, because such a suit was not competent and if such a suit was filed in fact, it was liable to be dismissed on the ground of absence of cause of action at that stage or as being premature. [*Para.* 7.]

Normally a debt is said to be due only after it has become payable and recoverable by the creditor. Till the debt has not become payable it cannot be said to be due. In certain circumstances, the term 'debt' may cover a case where it is payable even in future. Whether the term debt is used in the restricted sense of being payable presently, or is used in the wider sense of any debt whether payable in future or immediately has to be ascertained having regard to the other provisions of the Act as well as its scheme: Having regard to the actual terms of section 3 prohibiting the institution of a suit as well as the object of the Act, section 3 cannot apply to debts which had not become due and payable and with reference to which no suit can be instituted by the creditor. Section 3 will apply only to such cases where the debt has become payable and with reference to which a suit could be instituted for recovery thereof and it has no application to a debt not satisfying these requirements. [*Para.* 8.]

The mortgage debt in the instant case became payable only on 7th September, 1955 and therefore the bar of suit under section 3 of Madras Act V of 1954 as amended by Madras Act XXXVII of 1954, will not apply to the suit herein and therefore the plaintiff cannot have the benefit of the provisions contained in Madras Act V of 1954 for claiming exemption from the bar of limitation. [*Para.* 9.]

Case referred to:

Venkatakrishna High School v. *Rangaswami Iyer*, (1961) 1 M.L.J. 91: 74 L.W. 99.

Appeal against the decree of the Sub-Court, Erode, in O.S.No. 379 of 1967.

K. Sarvabhauman and *T. R. Mani*, for Appellant.

M. R. Krishnan and *S. Krishnamoorthy*, and the Government Pleader, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff in O.S. No. 379 of 1967, on the file of the Court of the Subordinate Judge, Erode, is the appellant herein,

*A.S. No. 385 of 1971. 21st January, 1975.

2. The appellant is the son of one A.B. Nagaraja Aiyar, the mortgagee under Exhibit A-1, dated September, 1952, executed by one N.T. Perumal Gounder, the deceased husband of the second respondent-second defendant, for a sum of Rs.7,500. The first respondent first defendant is stated to be a foster son of the said Perumal Gounder. The mortgage deed provided that the amount secured under the document, *viz.*, Rs. 7,500 was payable on the expiry of three years from the date of the mortgage. The suit itself was instituted on 15th November, 1967. In the plaint, by way of explaining the delay in claiming exemption from the bar of limitation, the appellant stated in paragraph 8:

"Cause of action for the suit arose on 7th September, 1952, when the mortgage was executed at Satyamangalam, on 7th September, 1955, when the three year period fixed under the mortgage for redemption expired, on 5th November, 1957 when the two months period fixed under section 80, Civil Procedure Code, expired within the jurisdiction of this Court. The suit is not barred by limitation as the period of two months fixed under section 80, Civil Procedure Code, has to be excluded in computing the period of limitation".

The plaint proceeded to state further in the same paragraph.

"Even if it is found that the subsequent mortgage is already discharged and hence third defendant is not a necessary party, the suit is not barred by limitation as defendants 1 and 2, being agriculturists, a period of 1 year 6 months and 26 days has to be excluded in computing the period of limitation under Madras Ordinance V of 1955, Madras Act V of 1955 and Madras Act I of 1955, and the suit is not barred by limitation."

Reliance on section 80, Civil Procedure Code, requires explanation. According to the appellant, the encumbrance certificate obtained by him with regard to the property mortgaged under Exhibit A-1 disclosed the existence of an encumbrance in favour of the State Government and therefore, he issued a notice under section 80, Civil Procedure Code, and the period of notice provided for in section 80, Civil Procedure Code, has to be excluded. It is alternatively only, he relies upon the three enactments referred to *viz.*, Ordinance V of 1953, Act V of 1954 and Act I of 1955.

3. The defendants-respondents raised several defences and they are reflected in the following issues framed by the trial Court:

1. Whether the plaintiff is entitled to the suit mortgage amount?

2. Whether the release deed referred to in para. 5 of the plaint is true and valid?

3. Whether the suit is in time, and whether the plaintiff is entitled to the exemptions as claimed in para. 8 of the plaint?

4. Whether the plaintiff has given credit to Rs. 2000 pleaded by the defendants 1 and 2?

5. What is the correct amount due to the plaintiff?

6. To what reliefs are the parties entitled?

An additional issue was framed on 22nd February of 1969 to the following effect:—

"Whether the adjustment pleaded by the plaintiff is true, correct and valid? Since I am upholding the dismissal of the suit on the ground that it was barred by limitation, I am not going into the details as to the different findings recorded by the learned Subordinate Judge on the various issues already extracted.".

4. I have already referred to the fact that the mortgage is dated 7th September, 1952 and the period prescribed for the payment of the amount was three years, which would take us to 7th September, 1955 and therefore, the suit should have been instituted within 12 years therefrom *i.e.*, on or before 7th September, 1967. The suit was actually instituted on 15th November, 1967. In this context, the question for consideration is whether the two grounds of exemption for the purposes of limitation claimed by the appellant were

available to him, or not. As far as the first ground is concerned, it was found by the trial Court that even before the institution of the suit, the debt due to the State Government had been discharged. Therefore, it is clear that the first ground of exemption was not available. Independently of this also, the first ground was not available for another reason as well. As I pointed out already, the suit should have been instituted on 7th September, 1967 and the requirement of a notice under section 80, Civil Procedure Code, will only add a period of two months to that period of limitation, which would take the appellant to 7th November, 1967 and the suit was actually instituted on 15th November, 1967. On that ground also, the appellant could not claim the benefit of the notice period under section 80, Civil Procedure Code.

5. That takes us to the second ground of exemption claimed by the appellant. The complaint of Mr. T.R. Mani, the learned counsel for the appellant, is that the trial Court has dealt with the claim for exemption with regard to the period of limitation based on Madras Act I of 1955, and that it has not dealt with the claim based on the other two enactments *viz.*, Madras Ordinance V of 1953 as well as Madras Act V of 1954. As far as Madras Act I of 1955 is concerned, the term 'agriculturist' has been defined in section 2 (*a*) as meaning :

> "A person who has an interest other than interest as a simple mortgagee in any agricultural or horticultural land not being a land appurtenant to a residential building, but shall not include—
>
> (i) any person liable to pay land revenue (which shall be deemed to include peshkush and quit-rent) exceeding one hundred and fifty rupees per annum in any year after 1952-53 ...."

The learned Subordinate Judge has recorded a finding that by virtue of this provision with regard to the payment of land revenue exceeding Rs. 150 per annum, defendants 1 and 2 did not fall within the definition of 'agriculturist' and therefore, the benefit of Madras Act I of 1955 was not available to them. Mr. T.R. Mani, did not challenge the correctness of this conclusion. However, he contended that notwithstanding this position the appellant was entitled to the exclusion of time provided for in Madras Ordinance V of 1953 as well as Madras Act of 1954. Now, I shall consider this contention.

6. Madras Ordinance V of 1953 defined the term 'agriculturist' in Clause 2 (*a*) as meaning :

> "any person, not being an incorporated company or a registered firm, regularly engaged in the cultivation of land to the possession of which he is entitled or out of the produce of which he is entitled to be maintained."

Section 3 of this Ordinance stated :

> " No suit for recovery of a debt shall be instituted, and no application for the execution of a decree for payment of money passed in any such suit shall be made, against any agriculturist in any civil Court before the expiry of a year from the commencement of this Ordinance. "

Section 5 provided for exclusion of time during which the Ordinance prohibited institution of proceedings and stated :

> " In computing the period of limitation prescribed for a suit for the recovery of a debt or an application for the execution of a decree passed in a suit for the recovery of a debt, the time during which the institution of the suit or the making of the application was barred by section 3, or during which the creditor refrained from instituting the suit or making the application in the honest belief that section 3 applied to such suit or such application shall be excluded."

This Ordinance came into force on 5th December, 1953. This Ordinance was replaced by Madras Act V of 1954 which was published in the Official Gazette on 6th February, 1954. In this Act, the expression 'agriculturist' was defined as meaning :

> "A person who owns an interest in land, and who by reason of such interest, is in possession of such land or is in receipt of the rents or profits thereof and shall include a lessee; but shall nto

include—(*i*) a firm registered under the Indian Partnership Act, 1932—or a company—or a corporation—, or (ii) any person who was assessed to income-tax under the Indian Income-tax Act (Central Act XI of 1922) in any of the years 1951—52, 1952-53, 1953-54."

Section 3 of this Act provided :

"No suit for recovery of a debt shall be instituted, no application for the execution of a decree for payment of money passed in a suit for the recovery of a debt shall be made, and no suit or application for the eviction of a tenant on the ground of non-payment of a debt shall be instituted or made, against any agriculturist in any civil or revenue Court before the expiry of a year from the date of commencement of this Act."

The period of prohibition of institution of suits for taking other proceedings against 'agriculturist' was altered by an amendment, *viz*., Madras Act XXXVII of 1954 by substituting the words and figures before the 1st March, 1955,' in the place of 'before the expiry of a year from the date of commencement of this Act' section 5 (1) of this Act provided :

"In computing the period of limitation or limit of time prescribed for a suit for recovery of a debt or an application for the execution of a decree passed in such suit the time during which the institution of the suit or the making of the application was barred by section 3 of the Ordinance or section 3 of this Act, or during which the plaintiff or his predecessor-in-title believing in good faith that section 3 of the Ordinance or section 3 of this Act applied to such suit or such application refrained from instituting the suit or making the application, shall be excluded."

Thus, it will be seen that the definition of the term 'agriculturist' is not identical in the Ordinance as well as in the Act. As a matter of fact, the definition of the term 'agriculturist' in the Ordinance is narrower than the definition contained in the Act, inasmuch as the definition of the term in the Ordinance contemplates the person concerned regularly engaging himself in the cultivation of land. In the present case, there is no case that defendants 1 and 2 were regularly engaged in the cultivation of land, and hence the Ordinance does not apply. However, even if Ordinance V of 1953 is not applicable, still, if the other requirements are satisfied, the appellant can get the benefit of Madras Act V of 1954, because the provisions of that Act tacked on to the period provided for in section 3, the period, provided for in section 3 of the Ordinance also. Consequently, the real question for consideration is whether the appellant is entitled to the benefit of exclusion of time provided for in section 5 (1) of Madras Act V of 1954.

7. I have already referred to the fact that under the terms of Exhibit A-1, the mortgage, the secured amount was repayable by the mortgagor only on 7th September, 1955 and not earlier. If so, the question of the appellant filing any suit for recovery of the amount due under the mortgage before 7th September, 1955 did not arise, and could not have possibly arisen. Section 3 of the Madras Act V of 1954, was intended to save agriculturists coming within the definition of that term in that Act from being harassed by the filing of suits, and that can apply only to suits which could otherwise be filed during the period of prohibition provided for by the Act. If the creditor did not have a cause of action to file a suit, the question of such a suit being prohibited by the Act, did not arise because, such a suit was not competent and if such a suit was filed in fact, it would be dismissed on the ground that the plaintiff did not have any cause of action to institute the suit at that stage, or it was premature. As I have already printed out, the mortgage deed having provided for the repayment of the money. After the expiry of three years from the date of the mortgage, the mortgage amount became due and payable only on 7th September, 1955 and not earlier. Therefore, prior to 7th September, 1955, the appellant did not have any cause of action to file a suit for recovery of the amount. Consequently, section 3 of the Act could not have applied to such a suit.

8. Mr. T.R. Mani drew my attention to the definition of the term 'debt' contained in section 2 (*b*) of Madras Act V of 1954,

and contended that that definition did not contemplate the debt being one presently payable and that included within its scope, any debt, whether payable immediately or in future. I am unable to accept this argument. No doubt, section 2 (*b*) of the Act defined 'a debt' as meaning—

> "any sum of money which a person is liable to pay under a contract, express or implied, for consideration received and includes rent in cash or kind which a person is liable to pay or deliver in respect of the lawful use and occupation of land."

Normally, debt is said to be due only after it has become payable and recoverable by the creditor. Till the debt has not become payable, it cannot be said to be due. In certain circumstances, the term 'debt' may cover a case where it is payable even in future. However, whether the term 'debt' has been used in the restricted sense of its being payable presently, or it is used in the wider sense of any debt whether payable in future or immediately, has to be ascertained having regard to the other provisions contained in the Act as well as the scheme of the Act. Having regard to the actual terms of section 3, which prohibited institution of a suit, as well as the object of the Act, it cannot be contended that section 3 was intended to apply to debts which had not become due and payable and with reference to which no suit could be instituted by the creditor. Therefore, a combined reading of the definition of the term 'debt' in section 2 (*b*) and of section 3 as well as section 5 clearly establishes that section 3 will apply only to such cases where the debt has become payable and with reference to which a suit could be instituted for recovery thereof and it had no application to a debt which had not become payable and with reference to which no creditor could have filed a suit.

9. For the reasons I have indicated, the mortgage debt under Exhibit A-1 became payable only on 7th September, 1955, and therefore, the bar of suit under section 3 of Madras Act V of 1954 as amended by Madras Act XXXVII of 1954 *viz.*, that no suit should be instituted before the 1st March, 1955 will not apply to the suit instituted by the appellant herein, and therefore, he cannot have the benefit of the provisions contained in Madras Act V of 1954, for claiming exemption from the bar of limitation.

10. Mr. T.R. Mani, drew my attention to a judgment of this Court in *Venkatakrishna High School* v. *Rangaswami Iyer*[1]. That judgment has no application to the facts of the present case, because, that dealt with the definition of the term 'debt' occurring in section 2 (*b*) of Madras Act I of 1955, and a suit instituted and decreed under section 3 (2) of that Act. As pointed out already, that Act does not apply to defendants 1 and 2 herein as found by the trial Court and not challenged before me.

11. In these circumstances, the appeal fails and is dismissed. Since the appeal is being dismissed only on the ground of limitation, I do not make any order as to costs.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, CJ.* and *S. Natarajan, J.*

The Secretary to the Govt. of India, Ministry of Finance Dept. of Revenue and Insurance, New Delhi and others .. *Appellants**

v.

A. Loganathan .. *Respondent.*

Central Excise and Salt Act (I of 1944), section 40 (2)—Check by Officials—Shortage found—Show cause notice issued—Assessment made—Notice to remit duty—Beyond 6 months from the date of check—If barred by limitation.

On 28th May, 1965 the warehouse of the respondent was checked and a shortage was found. On 21st December, 1967 a show cause notice was issued. Subsequently an assessment order was made and along with it demand of tax, on 16th May, 1968. The respondent's appeal and revision failed. On 3rd December, 1970 the respondent was served with a notice to remit the duty. The respondent challenged this

1. (1961) 1 M.L.J. 91 ; 74 L.W. 99.
*W.A. No. 134 of 1974. 16th July, 1975.

on the ground that the show-cause notice was beyond 6 months from 28th May, 1965 and was therefore barred by limitation. This was accepted by a single Judge of the High Court who quashed the orders of the department. On appeal by the department,

Held: In the case of excise duty tax is attracted not because the assessee violated some provisions of law, but because he manufactured goods which are assessable to excise duty but escaped charge. It follows, therefore, that once it is clear that violation is not the basis of assessment, the starting point of limitation can only be from the date of the accrual of the cause of action or of an act or an order made under that Act, which in this case, is either the proceedings started on 21st December, 1967 by way of show-cause notice or later the assessment order dated 16th May, 1968. Before that date, there is no room for applying section 40 (2). [*Para.* 2.]

Cases referred to:

Public Prosecutor v. *Raju*, (1973) 1 S.C.R. 812 : A.I.R. 1972 S.C. 2504; *Governor-General* v. *Shiromani Sugar Mills*, (1945) 1 M.L.J. 369 : A.I.R. 1945 F.C. 16; *Rele* v. *Deshpande*, (1967) 2 Comp.L.J. 210.

Appeal under clause 15 Letters Patent against the order of Ramaprasada Rao, J. in W.P. No. 600 of 1971 etc.

The Senior Standing Counsel for Central Government, for Appellants.

S. Chellaswamy, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, CJ.—The plea of limitation turns on the scope and applicability of section 40 (2) of the Central Excise and Salt Act, 1944. The respondent was a manufacturer of tobacco. On 28th May, 1965, his warehouse was checked by Central Excise officials with the result that shortage of 5738 kgs. was found in addition to substitution of 1730 kgs. We are not concerned with the substitution. On 21st December, 1967 a show-cause notice was served on the respondent as to why the shortage should not be brought to bear excise duty. After considering his explanation dated 4th January, 1968, an assessment order along with demand of tax was made on 16th May, 1968. The respondent's appeal failed on 22nd December, 1968 and so too his revision on 14th July, 1969. On 3rd December, 1970, he was served with notice to remit the duty. These orders of the department were quashed by Ramaprasada Rao, J., on the ground that the show cause notice of the Assistant Collector, treated as a 'proceeding' within the meaning of section 40 (2), was beyond six months from 28th May, 1965, and therefore was barred by limitation, the learned Judge's view being that limitation started from that date when the department came to have knowledge of the shortage. The learned Judge, in support of his view, relied on *Public Prosecutor* v. *Raju*[1].

2. With due respect, we are unable to concur with the view of the learned Judge. So far as the respective scope of sub-sections (1) and (2) of section 40 is concerned, we are undoubtedly bound by the judgment of the Supreme Court we have referred to. We may also take it for granted, without deciding for purposes of this appeal by the Central Government, that 'proceeding other than a suit' in sub-section (2) of section 40 may possibly cover assessment proceedings. We proceed on that basis because of *Governor General* v. *Shiroomani Sugar Mills*[2] and *Rele* v. *Deshpande*[3], which were decisions on section 171 of the Companies Act, 1913, and section 446 of the Companies Act, 1956, the phraseology there occurring being suit or other legal proceeding' for purposes of leave for being proceeded with when the company is under liquidation. In our opinion, an assessment proceeding, started with a show cause notice, as in this case, is not within the purview of section 40 (2). For the purpose of prosecution, of course, it will be different; in that case, a violation of any statutory provision or rule made thereunder in the taxing statute will be an offence for which prosecutions will lie. Such was the case in *Public Prosecutor, Madras* v. *R. Raju*[1]. But, assessment is not based on violation by the assessee of any provision of law, but is founded on the charging provision. Tax is attracted because the assessee makes income, or a

1. (1973) 1 S.C.R. 812: A.I.R. 1972 S.C. 2504:
2. (1945) 1 M.L.J. 369: A.I.R. 1945 F.C. 16.
3. (1967) 2 Comp.L.J. 210.

sale, or possesses wealth, or if some one dies his or her estate attracts duty. In the case of excise duty tax is attracted not because the assessee violated some provisions of law, but because he manufactured goods which are assessable to excise duty but escaped charge. It follows, therefore, that once it is clear that violation is not the basis of assessment, the starting point of limitation can only be from the date of the accrual of the cause of action or of an act or an order made under that Act, which in this case is either the proceedings started on 21st December, 1967, by way of show cause notice, or later the assessment order dated 16th May, 1968. Before that date, there is no room for applying section 40 (2).

3. In the order under appeal the learned Judge had proceeded upon the assumption that violating by the respondent through evasion formed the cause of action or the act. It is obvious that the assessee was not aggrieved by his own violation and as we mentioned, no proceeding is started, for the purpose of such violation. The proceeding started was on the basis of the charging provision, but not the provision creating offences and penalty for violation of any rule or a statutory provision. We allow the appeal with costs.

Counsel's fee Rs. 25.

S.J. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Veeraswami CJ., and S. Natarajan, J.*

The Union Territory of Pondicherry, represented by the Chief Secretary to Government of Pondicherry and others *Appellants**

v.

Mahe Beach Trading Company, Mahe by its Partners B. Kutti Hassan Haji, Mahe and others *Respondents.*

Pondicherry Municipal Decree (Levy and Validation of Taxes, Duties, Cesses and Fees) Act, 1973—Validity—Whether excessive delegation of legislative power—Whether violates Articles 19 (1) (g) *and* 14 *of the Constitution —Whether offence under section* 7 *of Pondicherry (Administration) Act* (*XLIX of* 1962)—*Pondicherry legislature can make retrospective legislation—Constitution of India* (1950), *Artilces* 14, 19 (1) (*g*).

The power to delegate is inherent in the power of the legislature to legislate on any subject-matter within its competence. In addition, when legislating on the subject in Entry 5 of the State List, it is competent for the Legislature to delegate for municipal purposes and subject to the procedure indicated, any or all of its taxing powers. The Pondicherry Legislature in enacting sections 3 and 4 in the Validation Act, had the legislative competence to authorise the municipal communes to raise, for the purpose of the communes, any of the taxes to be levied, assessed and collected in accordance with the provisions of the Municipal Decree of 1880.

[*Para.* 14.]

On the question whether the Pondicherry Municipal Decree (Levy and Validation of Taxes, Duties, Cesses and Fees) Act, 1973 was arbitrary and offended Articles 19 (1) (*g*) and 14 of the Constitution,

Held, there is adequate control; both external and internal, over the exercise of the taxing powers, and the Act is valid.

[*Para.* 15.]

*W.A. Nos. 240 and 383 of 1972.

22nd April, 1975.

The Municipal Communes are not, having regard to the provisions of the Municipal Decree (of 1880), free to pick and choose any tax for imposition; assessment and collection without going through the rigorous procedure including previous assent and subsequent control of the Governor. Notwithstanding the whole process of tax procedure envisaged by Municipal Decree, there is no sign of violation or likelihood of violation of either Article 19 (1) (*g*) or Article 14. [*Para.* 16.]

There is nothing in section 7 of the Pondicherry Administration Act, 1962 which comes into conflict with sections 3 and 4 of the Validating Act. The Validating Act was within the competence of the Pondicherry Legislature and section 7 of the Pondicherry (Administration) Act does not stand in the way of the Pondicherry Legislature enacting retrospective legislation. [*Para.* 20.]

The powers of the Pondicherry Legislature are plenary within their ambit, except to the extent that they are limited by either the Pondicherry (Administration) Act or the Government of Union Territories Act, 1963. Within the ambit of each of the legislative subject-matter, the Pondicherry Legislature is supreme and its powers are plenary, which means that it is within its competence to make retrospective legislation. It cannot, therefore, be held that the Validating Act in its retrospective operation, is invalid. [*Para.* 21.]

Cases referred to:

Mahe Beach Trading Company v. *Union Territory of Pondicherry*, (1972) 2 M.L.J. 213; *Municipal Corporation of Delhi* v. *Birla Cotton Spinning and Weaving Mills, Ltd. Delhi*, (1969) 1 S.C.J. 621: (1968) 3 S.C.R. 251: A.I.R. 1968 S.C. 1232; *Western India Theatres Ltd.* v. *Municipal Corporation, Poona*, 1959 S.C.J. 390: (1959) 2 S.C.R. (Supp.) 71: A.I.R. 1959 S.C. 586; *Cantonment Board, Poona* v. *Western India Theatres Ltd.*, A.I.R. 1954 Bom. 261; *Delhi Laws Act, In re*, 1951 S.C.J. 527: 1951 S.C.R. 747: A.I.R. 1951 S.C. 332; *Panama Refining Company* v. *Ryan*, (1934) 293 US 388; *Corporation of Calcutta* v. *Liberty Cinema*, (1965) 2 S.C.R. 477: A.I.R. 1965 S.C. 1107; *G.B. Modi* v. *Ahmedabad Municipality*, (1971) Tax.L.R. 1360: (1971) 3 S.C.R. 942: A.I.R. 1971 S.C. 2100; *Shama Rao* v. *Union Territory*, (1967) 2 I.T.J. 684: A.I.R. 1967 S.C. 1480; *Coll and Company Ltd.* v. *Norman Eggert Kropp and Thomas Alfred Hilley* (1967) 1 A.C. 141; *Queen* v. *Burah*, 1878 A.C. 889; *Hodge* v. *The Queen*, (1883) 9 A.C. 117; *Raichur Municipality* v. *B.A. Parasanna*, (1968) 1 S.C.R. 87: A.I.R. 1968 S.C. 255; *Hamdard Dawakhana* v. *Union of India*, 1960 S.C.J. 611: A.I.R. 1960 S.C. 554; *Vasanlal Mangashai* v. *State of Bombay* (1961) 1 S.C.J. 394: A.I.R. 1961 S.C. 4; *M/s. Devi Das* v. *State of Punjab*, (1967) 3 S.C.R. 557: A.I.R. 1967 S.C. 1895; *The Second Gift Tax Officer, Mangalore* v. *D.H. Hazarath*, (1971) 1 S.C.J. 1: A.I.R. 1970 S.C. 999; *Firm L. Hazarimal* v. *Income-tax Officer, Ambala*, A.I.R. 1957 Punj. 5; *K.T. Moopil Nair* v. *State of Kerala*, (1961) 2 S.C.J. 269: A.I.R. 1961 S.C. 552; *S.K. Singh* v. *V.V. Giri*, (1971) 2 S.C.J. 768: A.I.R. 1970 S.C. 2097; *Amraoti Municipality* v. *Ramchandra*, (1964) 6 S.C.R. 947: A.I.R. 1964 S.C. 1166; *Vajensingji Joravansingji* v. *Secretary of State for India in Council*, (1924) 51 I.A. 357: 47 M.L.J. 574: A.I.R. 1924 P.C. 216.

Appeals under Clause 15, Letters Patent against the order of Ramaprasada Rao, J. dated 3rd February, 1972 in W.P. No. 244 of 1971 P. etc.

F.S. Nariman, Additional Solicitor-General for Government Pleader of Pondicherry for Appeals

K.K. Venugopal for *N. Govindan, V. Manivannan, V. Narayanaswami*, for Respondents in Appellaints.

T.R. Srinivasan and *K. Ramamurthi* and *Miss Thayarammal* and *Krishnappan*, for Petitioners in Writ Petitions.

The Judgment of the Court was delivered by

Veeraswami, CJ.—The erstwhile French Establishments in India known as Pondicherry, Karaikkal, Mahe and Yanam, which by the Constitution (14th Amendment) Act, 1962, constitute the Pondicherry Union Territory, were divided by the French Government into 17 communes approximating to municipalities

or local self government we are familiar with. A French Decree dated 12th March, 1880 governed and regulated the municipal body of each commune. It provided for the setting up of the municipal body consisting of a Mayor and elected Municipal Council, their powers including powers of taxation for municipal purposes, budgets and procedure. With the *de facto* transfer under an agreement dated 21st October, 1954 of these French territories to the Indian Government, the Government of India, in exercise of powers conferred by section 4 of the Foreign Jurisdiction Act, 1947, made on 1st November, 1954 the French Establishment (Application of Laws) Order, 1954 and The French Establishments (Administration) Order, 1954. On 28th May, 1956, there was a Treaty of Cession of these French establishments between the President of India and the President of the French Republic and on 16th August, 1962 their *de jure* merger with India was carried out through Instruments of Ratification exchanged between the Indian Prime Minister and the French Ambassador, whereby France ceded to India, in full sovereignty the Territory of French Establishments aforesaid. Then followed the Constitution (14th Amendment) Act, 1962 on 28th December, 1962, which came into force from 16th August, 1962. On 16th August, 1962, the Pondicherry Administration Ordinance, 1962 was made, which was replaced on 5th December, 1962 by the Pondicherry (Administration) Act, 1962. By section 4 of this Act, all laws in force immediately before the appointed day in the former French Establishments should continue to be in force in Pondicherry Union territory until amended or repealed by a competent Legislature, or other competent authority, and by section 7, all taxes, duties, cesses and fees which, immediately before the appointed day, were being lawfully levied in the former French establishments should continue to be levied in Pondicherry Union territory and to be applied for the same purposes, until other provision was made by a competent Legislature or other competent authority. We are not concerned with the other provisions of the Act except that 'law' has been defined therein to include a decree, so that the decreed dated 12th March, 1880 continued to have force. On 10th May, 1963, the Government of Union Territories Act, 1963 was enacted by Parliament in exercise of powers under Article 239-A (1) providing for a local Legislature and Council of Ministers, their powers, procedure and other matters. On 7th August, 1969 the Municipal Council of Mahe decided to levy a Municipal tax of 5 paise on each litre of petrol and diesel oils sold at the petrol pump situate at Puzhitala, Mahe. The Mayor, based on that decision of the Municipal Council, and considering the Decree dated 12th March, 1880, issued an 'Arrete' with effect from 13th January, 1970 for levy of a municipal tax of 5 paise as abovesaid and for collection of the tax by the Receveur Municipal, or the Agent appointed by him. On a representation by the Mahe Beach Trading Co., which is the respondent in W.A. No. 240 of 1972, the Municipal Council by another Resolution dated 15th May, 1970 decided to reduce the rate from 5 paise to 2 paise on each litre of petrol and of diesel oil with effect from 24th February, 1970 and an Arrete to that effect was later issued on 16th October, 1970, by the Mayor of Mahe, who is one of the appellants in that appeal. On a petition under Article 226 of the Constitution by the respondent in that appeal, Ramaprasada Rao, J., in *Mahe Beach Trading Co.* v. *Union of Territory of Pondicherry*[1], held that the tax was on sale of goods, that levy of sales tax was in excess of the Municipality's power of taxation, that the tax also violated section 7 of the Pondicherry (Administration) Act, 1962, and that finally, the Pondicherry Legislature itself having enacted a General Sales Tax Act applicable to the Union Territory, the Municipal Council in any case, possessed no power to levy a parallel sales tax for municipal purposes. The learned Judge followed his own view and invalidated the levy of 50 paise per bag of sugar by the Villianur Municipality in Pondicherry. From both these orders arise W.A. Nos. 240 and 383 of 1972, which were filed by the Union Territory of Pondicherry and the Mayor of the related Municipality. Since then, the Administrator of Pondicherry promulgated the Pondicherry Municipal Decrees

1. (1972) 2 M.L.J. 213.

(Levy and Validation of Taxes, Duties, Cesses and Fees) Ordinance, 1973, which provided for levy assessment and collection of taxes, duties cesses and fees for the purpose of the Municipal decree dated 12th March, 1880 and for the validation of taxes, duties, cesses and fees levied thereunder. This Ordinance came into force on 18th January, 1973, which was replaced by the Pondicherry Municipal Decree (Levy and Validation of Taxes, Duties, Cesses and Fees) Act, 1973. This Act became law on 21st March, 1973, when it received the assent of the President and was published in the Pondicherry Gazette. The Act was given retrospective operation from 18th January, 1973, the date of the Ordinance. The respondents in the appeals have filed two petitions under Article 226 of the Constitution questioning the validity of the Ordinance as well as the Act. There are two other like petitions for the same purpose, in one of which the Toddy Tree Tax and Mahamai Tax on outgoing vehicles imposed by Kottucherry Commune are impugned as invalid. Since the appeals and the writ petitions raise common questions, they have been heard together.

2. Though we agree with the view of Ramaprasada Rao, J., that the Municipal decree of 1880 did not authorise the Municipalities to levy sales tax, on the view we are inclined to take on the validity of the Validation Act, it is not necessary to examine whether the Municipal decree of 1880 gave the municipalities in the erstwhile French Settlement power to levy sales tax, and for that reason we do not give our reasons separately for agreeing with Ramaprasada Rao, J., on that point. On the other two points decided by the learned Judge, we are unable to agree with him. Merely because the Pondicherry Legislature enacted the General Sales Tax Act to raise sales tax for purposes of the Government of Pondicherry, it did not follow that it could not simultaneously authorise the municipalities to raise sales tax for their own purposes. By enacting the Pondicherry General Sales Tax Act, the power of the Pondicherry Legislature was by no means exhausted so as to say that in view of it, it could no longer authorise the municipalities to levy sales tax for purposes of the local Government. The Pondicherry Legislature could have collected by means of the Pondicherry General Sales Tax Act a surcharge on General Sales Tax and made over the same to the municipalities for their purposes. Instead the same Legislature without following that procedure, could directly authorise the Municipalities to levy sales tax to meet their needs. In either case, the necessary power was available to the State Legislature. As to the impact of section 7 of the Pondicherry (Administration) Act, 1962, the matter is dealt with *infra* in the context of the Validating Act. Before proceeding further, we may observe that if the Validating Act is held to be valid, the appeals will succeed and the writ petitions fail.

3. The attack on the validity of the Pondicherry Municipal Decree (Levy and Validation of Taxes, Duties, Cesses and Fees) Act, 1973 is levelled on three main grounds—

(1) Excessive delegation of legislative power;

(2) The Act is arbitrary and offends Article 14, and inasmuch as it makes no procedural safeguards as to levy, assessment, collection, appeals, limitation and the like it violates Article 19 (1) (g); and

(3) Violation of section 7 of the Pondicherry (Administration) Act, 1962.

Two other points taken for the petitioners are—

(1) The Pondicherry Legislature being a subordinate legislature, it has no power to enact retrospective legislation; and

(2) in any case, the Pondicherry legislature has no power to amend the pre-Constitution laws.

We shall deal with these grounds seriatim.

4. Before we deal with the first ground, we may set out the relevant provisions of the Validating Act which are identical with the Ordinance. Mention has already been made of the object of the Act and the Presidential assent thereto. Section 2 defines 'Government' in terms of the Administrator of the Union Territory of Pondicherry appointed by the Presi-

dent under Article 239 of the Constitution; 'Municipal Commune' as a commune mentioned in Article 1 of the Municipal decree, "Municipal council" as the body constituted to manage the municipal affairs in a municipal commune, and 'Municipal decree' as the Decree of French Government dated 12th March, 1880, as amended from time to time. Sections 3 and 4 are as under:

"3. Any tax, duty, cess or fee which the Legislature of the Union Territory of Pondicherry has power to levy, may subject to any general or special order which the Government may make in this behalf, also be levied, assessed and collected for the purposes of the Municipal decree in accordance with the provisions contained in or made under the Municipal decree and notwithstanding the provisions of section 7 of the Pondicherry (Administration) Act, 1962, or of any provision of any Act passed by the Legislature of the Union Territory of Pondicherry, the Municipal decree shall have, and shall be deemed to have had on and from the 16th day of August, 1962, effect accordingly.

4. Notwithstanding any judgment, decree or order of any Court, all taxes, duties cesses and fees (being taxes, duties cesses and fees which the Legislature of the Union Territory of Pondicherry has power to levy) levied, assessed or collected or purporting to have been levied, assessed or collected under the Municipal decree before the commencement of this Act shall be deemed to have been validly levied, assessed or collected in accordance with law as if the provisions of section 3 have been in force at all material times when any such tax, duty, cess or fee was levied, assessed or or collected; and accordingly—

(*a*) all acts, proceedings or things done or taken by the municipal councils or by any other authority, officer, or person in connection with the levy, assessment or collection of any such tax, duty, cess or fee shall, for all purposes, be deemed to be, and to have always been done or taken in accordance with law;

(*b*) no suit or other proceeding shall be maintained or continued in any Court against the municipal councils or any other authority, officer or person whatsoever for the refund of any tax, duty, cess or fee so collected; and

(*c*) no Court shall enforce any decree or order directing the refund of any tax, duty, cess or fee so collected;

Provided that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this Act had not been passed."

Section 5 repeals the Ordinance and makes the usual savings.

5. When an imposition and collection of tax are found by a Court to be invalid for want of authority therefor, it is set right by the Legislature if it minds to do so, not by invalidating Court's decisions right away which it cannot do, but by enacting provisions by which first the competence or authority it was lacking is supplied with retrospective effect, and next by declaring, on the basis of the retrospective law, that the tax imposed and collected should be deemed to have been validly levied and collected. Accordingly, consequential subsidiary provisions are made giving insulation to all acts, proceedings and things done as validly done, inhibiting suits and Court's jurisdiction in respect of refund claims. The Validating Act under consideration takes this stereotype pattern of such legislation. Section 3 is capable of disection into five parts:

(1) A municipal commune may levy, assess and collect tax, duty, cess or fee which the Pondicherry Legislature has power to levy. This is subject to any general or special order which the Pondicherry Government may make in that behalf;

(2) The word 'also' in the phrase 'also be levied' in section 3 suggests that the power of the Pondicherry legislature to raise revenue for purposes of the Government is left intact:

(3) The levy, assessment and collection of the impost by a municipal commune shall be for purposes of the Municipal Decree;

(4) Such levy, assessment and collection shall be in accordance with the provisions contained in or made under the Municipal decree; and

(5) The Municipal decree shall have and shall be deemed to have had effect from 15th August, 1962 and this shall be so irrespective of section 7 of the Pondicherry (Administration) Act, 1962, or any provision of any Act passed by the Pondicherry Legislature.

6. On the basis of these premises, section 4 validates levy, assessment and collection of any tax etc., made under the Municipal Decree before the amending Act came into force, to wit, any levy, assessment or collection from 16th August, 1962, which was anterior to the Government of Union Territories Act, 1963.

7. Mr. Venugopal, for the petitioner contends with ability and skill, that section 3 is a case of total abdication of the Pondicherry Legislature of its legislative power to tax by setting up the municipal communes as parallel legislatures and transferring to them the whole of the taxing power, or the entire gamut of its taxing power. The learned Additional Solicitor-General has, of course, ably and even more strenuously countered him, thus both counsel citing and relying on a plethora of decided cases in support of one or the other view.

8. Though the law regarding permissible limits of delegation of legislative power to subordinate authorities has been stated in some of the decided cases, as for instance, the *Municipal Corporation of Delhi* v. *Birla Cotton Spinning and Weaving Mills Ltd. Delhi*[1], inasmuch as the tests have been variously propounded in different decisions and by different learned Judges even in the same case, it has still to be found how the law on that matter has been settled. The authorities, however, are uniform, that having regard to the modern complexities of fast changing political, economic and social values, needs and advancement, it is impossible for Legislatures with sovereign legislative power to give effect by themselves and on their own, to their legislative intention, and, therefore, in the nature of things delegation for subodinate legislation has been and is inevitable. The practice of the principle, ever widening as it is, is in evidence even in countries where there is supposed or claimed to be complete separation of powers of State. Skeleton legislation expressing but merely the legislative policy, sometimes with or without standards for its execution, and even vital details of working and effectuating the express legislative policy, being left to subordinate legislation, is getting into vogue more and more in modern times. Necessity of the situation, therefore, has to be borne in mind in resolving a problem on alleged excessive delegation. One other fact on which there is unanimity in decided cases, is, the time-honoured legislative practice in India and in major parts of the world, of the legislatures necessarily entrusting municipal bodies or local self government as they are so called, set up on more or less elective principles, with powers to raise revenue to meet the needs of municipal administration. This has been recognised by the Government of India Act, 1935 and as a matter of fact by also the several Constitutional Acts preceding it.

9. Entry 5 of the State List in the VII Schedule to the Constitution is, "Local Government that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self Government or village administration." When on this topic a State legislature enacts to set up local self-Government for a town, city or area, and makes provision for its constitution and powers, necessarily, such powers have to include the power to raise revenue as may be required to carry out its duties and obligations and as a civic or local body, conventionally concerned with roads, water, drainage, health and sanitation within municipal limits. There is nothing to prevent the State Legislature itself to raise the needful revenue and make the same over to the municipal bodies. But this device has been seldom resorted to. The Legislative power on the subject of local-self Government in Entry 5 should, therefore,

1. (1969) 1 S.C.J. 621 : (1968) 3 S.C.R. 251: A.I.R. 1968 S.C. 1232.

be taken to inherently include, in the set up of the local Government the right to make over some of the powers of taxation which the State Legislature itself has. This is also justified by the fact that the functions of the local self-Government are but identifiable with and derived from those of the State Government itself. For convenience and more effective control and effectuation and representation, what may be regarded as local functions peculiar to civic matters are entrusted to, and carried out through local self-Government. In our opinion, therefore, delegation of taxing powers to municipal bodies is within the ambit of those powers, and if necessary, of Entry 5 as well provided the State Legislature itself has those taxation powers. Competency of the Pondicherry Legislature to delegate to the Municipal communes its taxing powers cannot, therefore, be questioned. That Legislature, under the Government of Union Territories Act, 1963, by section 18 (1) may make laws for the whole or any part of the Union territory with respect to any of the matters enumerated in the State List or in the Concurrent List in the VII Schedule.

10. But, the question is, whether the Pondicherry Legislature was competent to make unselective and omnibus delegation to the municipal commune of the power to raise any tax, duty, cess or fee whatsoever. Ususally, property tax, profession tax, water tax and the like, are allowed to be levied and collected by municipalities for their purposes. But, some of the Muncipalities' Acts as in Bombay, Delhi, Calcutta, after enumerating these usual taxes, also mentioned "any other tax which the State Legislature has power to impose." In some cases of municipalities as in Delhi, taxes, which the municipalities can raise are classified as compulsory and optional. In *Western India Theatres Ltd.* v. *Municipal Corporation, Poona*[1], a general provision that the Bombay Municipality may impose 'any other tax' for the nature and object of which the approval of the Governor in Council was obtained was held to be valid because the tax was imposed for the purpose of the municipality. In dealing with and rejecting an argument that section 59 (1) (*xi*) of the Bombay District Municipalities Act, 1901 which authorised the Municipality to raise any other tax as aforessaid was unconstitutional in that the Legislature had completely abdicated its functions and had delegated essential legislative power to the Municipality to determine the nature of the tax to be imposed on the rate-payers, and that the power thus delegated to the Municipality was unguided, uncanalised and vagrant because there was nothing in the Act to prevent the Municpality from imposing any tax it liked, even say, income-tax, and that such omnibus delegation could not, on the authorities be supported as constitutional, the Supreme Court observed:

> "In the first place, the power of the municipality cannot exceed the power of the provincial legislature itself and the municipality cannot impose any tax, *e.g.* income-tax which the provincial legislature could not itself impose. In the next place, section 59 authorises the municipality to impose the taxes therein mentioned for the purposes of this Act. The obligations and functions cast upon the municipalities are set forth in Chapter VII of the Act. Taxes therefore, can be levied by the municipality only for implementing those purposes and for no other purpose.......Finally, the provincial legislature had certainly not abdicated in favour of the municipality for the taxing power of the municipality was quite definitely made subject to the approval of the Governor in Council........In our opinion, the impugned section did lay down a principle and fix a standard which the municipalities had to follow in imposing a tax and the legislature cannot, in the circumstances, be said to have abdicated itself and, therefore, the delegation of power to impose any other tax cannot be struck down as being in excess of the permissible limits of delegation of legislative functions".

The test is, therefore, one of competence of the legislature to delegate, and the delegation is not unconsitutional because the Legislature itself did not select, but gave the option to the Municipality to

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1. 1959 S.C.J. 390 : (1959) 2 S.C.R. (Supp.) 71: A.I.R. 1959 S.C. 586.

decide to levy any other tax. If competence to delegate the power for any taxes is granted, it makes no difference to its constitutionality that selection of taxes to be imposed, is left to the municipality, provided the legislature in making the delegation expressed its legislative policy, principle and standard. The policy indicated in section 59 (1) (*xi*) of the Bombay District Municipalities Act, was that the Municipality could raise any other tax than those enumerated in the earlier part of the section and the principle was that the municipality could raise any tax for the purposes of the municipality, and the standard and control the Legislature laid down was that the municipality could do so, with the previous approval of the Governor in Council.

11. The Bombay Municipal Boroughs Act, 1925, authorised by section 73 (*xiv*) the Municipal Borough to levy any other tax (not being a toll on motor vehicles and trailers, save as provided by section 14 of the Bombay Motor Vehicles Tax Act, 1935) which under the Government of India Act, 1935, the Provincial Legislature has power to impose in the Province. The Borough municipalities situate within the Province of Bombay could levy any tax other than the one mentioned in the exception referred to, which could be levied by the Provincial Legislature itself in the Province. In *Cantonment Board, Poona* v. *Western India Theatres Ltd.*[1], the validity of this section was upheld, and in doing so, the Cout observed:—

"In *Delhi Laws Act, In re*[2]....there was unanimity upon the point that where the Legislature had laid down a policy or in other words where in the first instance the Legislature had legislated itself upon the subject matter of the statute, it was permissible to allow others, may be a provincial Government, may be an outside body, to undertake subordinate legislation within the powers conferred, and no legislation could be impugned on the ground that this had been permitted...... It was thus observed in *Schechter* v. *United States*[1],—'so long as a policy is laid down and a standard established by a statute, no unconstitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply'."

After quoting the words of Justice Cardozo in *Panama Refining Co.* v. *Ryan*[2], that the discretion left to the subordinate legislative authority must not be unconfined and vagrant, but it must be canalised within even banks which kept it from overflowing, the Bombay High Court further stated—

"It appears to us that applying this test there is nothing in section 59 (1) (*xi*) which renders that section *ultra vires* of the Governor in Council because of legislative power having been delegated. The Governor in Council in this case was legislating upon the subject of local self-Government. It was deemed desirable that municipalities should be constituted within the province, and if municipalities are to be constituted within the province, it was necessary to allot to them sources of taxation. The sources of taxation mentioned in clauses (*i*) to (*x*) of section 59 (1), therefore, were in the first instance allotted to them. Then it was considered necessary apparently either because those sources may be insufficient or because sometimes the municipalities might prefer to levy another tax in lieu of taxes mentioned in clauses (*i*) to (*x*) that they should have power to levy other taxes also. The question then arose what other taxes the municipalities can be empowered to impose. Section 59 (1) (*xi*) provides that they had to obtain the previous approval of the Governor in Council to the nature and object of the tax. It cannot possibly be said, therefore, in this case that the Legislature had not itelf legislated at all on the subject-matter. As I have already mentioned, the subject of the legislation was the constitution of municipalities. If the municipalities

1. A.I.R. 1954 Bom. 261.
2. 1951 S.C.J. 527 : (1951) S.C.R. 747: A.I.R. 1951 S.C. 332.

1. (1935) 295 U.S. 495.
2. (1934) 293 U.S. 388.

were constituted, then they had to be allotted certain sources of revenue. A policy was consequently laid down to a very large extent".

In *Hirabhai Ashabhai Patil* v. *State of Bombay*[1], water tax levied by measurement through meter was impugned. Section 169 gave discretion to the Commissioner to charge for water supplied by measurement, at such rate as shall, from time to time, be prescribed by the Standing Committee in that behalf. The validity of the section was canvassed on the ground of competency. The Bombay High Court, while rejecting the contention, referred to Entry 5 of the State List in the Constitution and observed :

"Now, there can be no doubt that the power of taxation conferred upon the Bombay Municipality is for the purpose of local self-government."

and held that therefore, the State Legislature was competent to confer upon the local authority the power to tax. It was further pointed out that if the State Legislature was competent to confer upon the local authority the power to tax, its competency could not be affected because the power, that had been conferred was an unlimited power, and that the fact that no limitation had been imposed may lead to the legislation being challenged on some other ground, but it could not be challenged on the ground of competence.

12. The *Municipal Corporation of Delhi* v. *Birla Cotton Spinning and Weaving Mills, Delhi*[2], contains elaborate consideration of the question of excessive delegation, and review of the earlier decisions of the Supreme Court on the subject. The learned Chief Justice for himself and Shelat, J., summed up the result—

"A review of these authorities therefore leads to the conclusion that so far as this Court is concerned, the principle is well established that essential legislative function consists of the determination of the legislative policy and its formulation as a binding rule of conduct and cannot be delegated by the Legislature. Nor is there any unlimited right of delegation inherent in the legislative power itself. This is not warranted by the provisions of the Constitution. The Legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purposes and objects of the Act. Where the legislative policy is enunciated with sufficient clearness or a standard is laid down, the Courts should not interfere. What guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on a consideration of the provisions of the particular Act with which the Court has to deal including its preamble. Further it appears to us that the nature of the body to which delegation is made is also a factor to be taken into consideration in determining whether there is sufficient guidance in the matter of delegation."

Hidayatullah, J., as he then was, who spoke for himself and Ramaswami, J., was of opinion that the proper test to apply was not the existence of safeguards but whether the legislative will to impose the tax was adequately expressed so as to bind those who have to pay the tax. This, he pointed out, required an examination of the policy and provisions of the Act with a view to determining whether the legislative will was fully expressed to invest the Municipal Committee with the power to levy the tax subject, of course, to a proper procedure being evolved. The learned Judge declined to accept the principle that the Legislature must itself impose the tax by laying down the rate of the tax, the persons to be taxed, the manner of the levy and collection, and held :

"The doctrine that Parliament cannot delegate its powers, therefore, just be understood in a limited way. It only means that the Legislature must not efface itself but must give the legislative sanction to the imposition of the tax and must keep the control in its own hands......Once it is established that the Legislature itself has willed that a particular thing

1. A.I.R. 1955 Bom. 125.
2. (1969) 1 S.C.J. 621 : (1968) 3 S.C.R. 251 : A.I.R. 1968 S.C. 1232.

be done and has merely left the execution of it to a chosen instrumentality (provided that it has not parted with its control) there can be no question of excessive delegation. If the delegate acts contrary to the wishes of the Legislature, the Legislature can undo what the delegate has done. Even the Courts, as we shall show presently may be asked to intervene when the delegate exceeds its powers and functions.......Even in America the doctrine is much watered down especially when it is a question of investing municipalities with power of such taxation. Parliament when it confers such powers, cannot be said to abdicate or efface itself unless it can be said that it has lost its control over the action of the delegate."

Shah and Vaidialingam, JJ., expressed the view:

"The increasing complexity of modern administration, the difficulty of passing complicated measures through the method of parliamentary debate and discussions, and the number of details and technical matters which must of necessity be provided for in statutes, have led to an increase in the practice of entrusting power to executive or other agencies to make subsidiary or ancillary legislation. By entrusting that power to another body, the Parliament does not delegate its essential legislative functions. But the authority to entrust subsidiary or ancillary power is not unrestricted. The power cannot be conferred upon a delegate without setting out some principle, policy, or standard which is to guide the delegate in discharging its delegated functions. If the Parliament lays down by legislative act adequate guidance, whatever form it takes, and the delegate is required to conform to that guidance, entrustment of authority to the delegate to make subordinate legislation will be upheld. The power of delegating legislative authority cannot, however, be extended to investment of authority in another body in respect of matters relating to principle or policy of legislation, to the amendment of Parliamentary Act so as to affect the substance thereof or to investment in the executive power when no guidance or standard is laid down in that behalf or to authorise the executive to encroach upon the judicial power of the State.... The power of the State to legislate in matters of taxation within the allotted field is plenary, but in entrusting that power to a local authority the Legislature cannot confer unguided authority.'

The learned Judges further observed on a review of some of the cases decided by the Supreme Court:

"On a review of the cases the following principles appear to be well settled: (i) Under the Constitution the Legislature has plenary powers within its allotted field; (*ii*) Essential legislative function cannot be delegated by the Legislature, that is, there can be no abdication of legislative function or authority by complete effacement, or even partially in respect of a particular topic or matter entrusted by the Constitution to the Legislature; (*iii*) Power to make subsidiary or ancillary legislation may however be entrusted by the Legislature to another body of its choice, provided there is enunciation of policy, principles, or standards either expressly or by implication for the guidance of the delegate in that behalf. Entrustment of power without guidance amounts to excessive delegation of legislative authority; (*iv*) Mere authority to legislate on a particular topic does not confer authority to delegate its power to legislate on that topic to another body. The power conferred upon the Legislature on a topic is specifically entrusted to that body and it is a necessary intendment of the constitutional provisions which confer that power that it shall not be delegated without laying down principles, policy, standard or guidance to another body unless the Constitution expressly permits delegation; and (*v*) the taxing provisions are not exceptions to these rules."

Sikri, J., as he then was, who spoke for himself opined:

"Apart from authority, in my view, Parliament has full power to delegate legislative authority to subordinate bodies. This power flows in my judgment, from Article 246 of the Constitu-

tion. The word 'exclusive' means exclusive of any other Legislature and not exclusive of any subordinate body. There is however, one restriction in this respect and that is also contained in Article 246. Parliament must pass a law in respect of an item or items of the relevant list. Negatively this means that Parliament cannot abdicate its functions. It seems to me that this was the position under the various Government of India Acts, and the Constitution has made no difference in this respect. I read *Hodge* v. *The Queen*[1], as laying down that Legislatures like the Indian Legislature had full power to delegate legislative authority to subordinate bodies. In the judgment in these cases no such word as 'policy' 'standard' or 'guidance' is mentioned. It is true that in *Hodge* v. *The Queen*[2], the words 'ancillary to legislation' are mentioned but if we examine sections 4 and 5 of the Liquor Licence Act, 1877, it would be found that the guidance is contained in those sections for defining the conditions and qualifications requisite to obtain tavern licences, for limiting the number of tavern and shop licences, and the nature of the penalty to be imposed for the infraction thereof."

In the *Municipal Corporation of Delhi* v. *Birla Cotton Spg. and Wvg. Mills, Delhi*[2] which we have just now referred to, it was held that section 150 of the Delhi Municipal Corporation Act which authorise the Municipality to levy any of the optional taxes by prescribing the maximum rates of tax to be levied fixing the class or classes of persons or description or descriptions of articles and properties to be taxed and laying down the system of assessment and exemptions, if any to be granted, was not unguided and could not be said to amount to excessive delegation. In *Corporation of Calcutta* v. *Liberty Cinema*[3] and *G.B. Modi* v. *Ahmedabad Municipality*[4], it was pointed out that fixing of rate of tax was not an essential Legislative function. In *Shama Rao* v. *Union Territory*[1], the Pondicherry General Sales Tax Act was held to be void. It was also held that the Pondicherry General Sales Tax (Amendment) Act of 1966 did not have the effect of reviving it. The majority in that case said :

> "The Pondicherry General Sales Tax Act (X of 1965), which extended the Madras General Sales Tax Act I of 1959 as it stood immediately before the date on which the Pondicherry Act would be brought into force in the territory of Pondicherry by a notification issued by the Government as provided in section 1 (2) was void and still born, because the Pondicherry Legislature in enacting the Act in that manner had totally abdicated its legislative functions in the matter of sales tax legislation and surrendered it in favour of the Madras Legislature."

It may be noticed that in that case, the Pondicherry Legislature not only adopted the Madras Act as it stood on the date when it passed the principal Act, but also enacted that if the Madras Legislature were to amend its Act prior to the date when the Pondicherry Government would issue its notification, it would be the amended Act which would apply. As a result, the Pondicherry Legislature accepted the Madras amended Act, though it was not held and could not be aware what the provisions of the Madras amended Act would be. Naturally, in the circumstances, it was held that this was a case of total surrender by the Pondicherry Legislature of its legislative powers in the matter of sales tax legislation, to the Madras Legislature.

13. We shall, now, refer to *Coll and Co., Ltd.* v. *Norman Eggert Kropp and Thomas Alfred Hiley*[2]. It was decided by the Privy Council. The validity of State Transport Facilities Act, and the State Transport Act, both of Queensland, was challenged. The Acts gave the Commissioner for Transport, power to fix and recover licences and permit fees. The

1. (1883) 9 A.C. 117 and (1885) 10 A.C 282.
2. (1969) 1 S.C.J. 621 : A.I.R. 1962 S.C. 1232.
3. (1965) 2 S.C.R. 477 : A.I.R. 1965 S.C. 1107.
4. (1971) Tax.L.R. 1360 : (1971) 3 S.C.R. 942 : A.I.R. 1971 S.C. 2100.

1. (1967) 2 I.T.J. 684: A.I.R. 1967 S.C. 1480.
2. (1967) 1 A.C. 141.

two actions which eventually led to the appeals before the Privy Council were for repayment of fees levied and collected by the Commissioner under the two enactments. In upholding the validity of the two Acts, the Privy Council held that by enacting them the Queensland Legislature did not abdicate itself of its power to legislate for the peace, welfare and good Government of the State. It was pointed out that the Queensland Legislature was entitled to use any agent or any subordinate agency or any machinery that they considered appropriate for carrying out the objects and purposes that they had in mind and which they designated, and they were entitled to use the Commissioner for Transport as their instrument to fix and recover the licence and permit fees, provided they prescribed their own capacity intact and retained perfect control over him, and, that, as they could at any time repeal the legislation and withdraw such authority and discretion as they had vested in him, they had not assigned or transferred or abrogated the sovereign power to levy taxes nor did they renounce or abdicate their responsibilities in favour of a newly enacted legislative authority. In repelling an argument that the two enactments amounted to an abandonment or abdication of power in favour of a newly created legislative authority, the Privy Council referred to *Queen* v. *Burah*[1], to the effect that the Indian Legislature had powers expressly limited by the Act of the Imperial Parliament which created it, and that, they are acting within the limits which circumscribed them, it was not in any sense an agent or delegate of the Imperial Parliament, but had, and it was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself, and then stated that nothing comparable with a new legislative power armed with general legislative authority had been created by the passing by the Queensland Legislature of the two Transport Acts. The circumstance that the Commissioner was endowed with certain powers of decision and measures of discretion, was not considered to support in any realistic sense the contention that the Queensland Legislature exceeded its plenary and ample powers. The Privy Council quoted the following from *Hodge* v. *The Queen*[1].

> "It was argued at the Bar that a Legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact and can, whenever it pleases destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it seeks the aid of subordinate agencies and how long it shall continue them, are matters for each Legislature, and not for Courts of law, to decide."

It went on to say—

> "The Legislature were entitled to use any agent or any subordinate agency or any machinery that they considered appropriate for carrying out the objects and purposes that they had in mind and which they designated. They were entitled to use the Commissioner for Transport as their instrument to fix and recover the licence and permit fees. They were not abrogating their power to levy taxes and were not transferring that power to the Commissioner. What they created by the passing of the Transports Acts could not reasonably be described as a new legislative power or a separate legislative body armed with general legislative authority... Nor did the Queensland Legislature create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence..... In no sense did the Queensland Legislature assign or transfer or abrogate their powers or renounce or abdicate their responsibilities. They did not give away or relinquish their taxing powers. All that was done was done under and by reason of their authority. It was by virtue of their will that licence and permit fees become payable. Nor was there any alteration of the Legislature."

The ratio of the Privy Council judgment is very significant and telling. It seems that it is unnecessary to refer to the other cases which have been cited before us on either side in respect of the first ground of the petitioners.

1. 1878 A.C. 889.

1. (1883) 9 A.C. 117.

14. To sum up the legal position as to abdication of legislative powers or excessive delegation; abdication means total surrender or transfer by the Legislature of its legislative functions to another body to legislate on a particular subject-matter, within its legislative competence. Such surrender or abdication is illustrated by *Shamarao* v. *Union Territory* [1]. What is legislative function will depend upon the particular subject-matter of legislation. There is no abdication, surrender of legislative function or excessive delegation, so long as the Legislature has expressed its will on a particular subject-matter indicated its policy and left the effectuation of the policy to subordinate or subsidiary and ancillary legislation, provided the Legislature retained the control in its hands with reference to it, so that it can act as a check or a standard and prevent or undo the mischief by subordinate legislation, when it chooses to, or thinks fit. Those principles apply as well to delegation of the power of taxation. The power to delegate is inherent in the power of the Legislature to legislate on any subject-matter within its competence. In addition, we are of opinion that when legislating on the subject 'in Entry 5 of the State List, it is competent for the Legislature to delegate for municipal purposes and subject to the procedure indicated any or all of its taxing powers.' Applying these tests, we are of opinion that the first ground of the petitioners should fail because the Pondicherry Legislature in enacting sections 3 and 4 in the Validation Act, had the legislative competence to authorise the municipal communes to raise, for the purpose of the communes, any of the taxes to be levied, assessed and collected in accordance with the provisions of the Municipal Decree of 1880. The amending Act clearly expressed the legislative policy to make an enabling law with retrospective effect to impose any tax, so that it could also validate under its cover as it were, the tax which the communes had actually imposed, assessed and collected under the municipal decree before the commencement of the Amending Act, on the erroneous assumption that the Municipal Decree itself had conferred authority to levy and collect the related tax. Section 3 made it clear that this delegation of taxing power was subject to any general or special order which the Government might make in this behalf. As we mentioned earlier, by the word 'also' in section 3, the Pondicherry Legislature indicated that while it retained its own power of taxation under the State List, it also enabled the municipal communes to levy, assess and collect any tax, duty, cess or fee within the competence of the Legislature. The Legislature did not leave the matter there. It also by section 3 laid down the principle that any tax, duty, cess or fee which the communes could levy, assess and collect, should only be for purposes of the municipal decree which means that such levy, assessment and collection of any tax should be for purposes of the related municipal commune. Section 3 went still further and forged the procedural check or control by making it clear that such levy, assessment and collection of any tax should also be in accordance with the provisions contained in, or made under the Municipal Decree. That these words, in accordance with the provisions' related to the procedure of levy, assessment and collection is clear from *Raichur Municipality* v. *B. A. Parasanna* [1]. The Court there observed that the expression 'imposed in accordance with the provisions of the Act' in section 97 (1) of the Mysore Municipalities Act, 1964 meant 'imposed in accordance with the procedure provided under the Act.' We therefore, think that *Hamdard Dawakhana* v. *Union of India* [2], *Vasanlal Mangashai* v. *State of Bombay* [3], *Corporation of Calcutta* v. *Liberty Cinema* [4], *Messrs Devidas* v. *State of Punjab* [5], *Shama Rao* v. *Union Territory* [6], *The Second Gift Tax Officer, Mangalore* v. *D.H. Hararath* [7] and *Firm L. Hazarimal* v. *Income-tax Officer, Ambala* [8], to which our

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1. (1967) 2 I.T.J. 684: (1967) 2 S.C.J. 749: A.I.R. 1967 S.C. 1480.

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1. (1968) 1 S.C.R. 87: A.I.R. 1968 S.C. 255.
2. 1960 S.C.J. 611: A.I.R. 1960 S.C. 554.
3. (1961) 1 S.C.J. 394: A.I.R. 1961 S.C. 4
4. (1965) 2 S.C.R. 477: A.I.R. 1965 S.C. 1107.
5. (1967) 3 S.C.R. 557; A.I.R. 1967 S.C. 1895.
6. (1967) 2 S.C.R. 650: A.I.R. 1967 S.C. 1480.
7. (1971) 1 S.C.J. 1: A.I.R. 1970 S.C. 999.
8. A.I.R. 1957 Punj. 5.

attention was drawn by Mr. Venugopal do not help to uphold the first ground.

15. The second ground complains that the Municipal Decree of 1880 does not have a reasonable procedure with reference to levy, assessment and collection peculiar to the particular taxes which the Municipalities were authorised to levy, assess and collect, and that, therefore, the amending Act violated Article 19 (1) (*g*) of the Constitution. It is further said that the amending Act gives the municipal communes arbitrary power to pick and choose any tax or impost as they like, fix any rate of tax without any legislative guidance, and even to impose the entire financial burden of municipal administration on one section of tax-payers, and that this was in violation of Article 14. The substance of these contentions bears on alleged lack of control and guidance on the taxing powers of the communes in the light of the Validating Act. But we find that there is adequate control, both external and internal, over the exercise of these taxing powers. The Decree of 1880 shows that the municipal council in a commune is an elected body. The Governor of the erstwhile establishments was under the decree given the power of dissolving the municipal councils or suspending the same. Similarly, the Mayors and Deputy Mayors of the Municipal Councils are also subject to similar powers of the Governor. In exercise of the taxing powers of the municipal communes as authorised by the Validating Act, tax could be raised only for purposes of the Municipality, and these purposes are elaborately set out in the Municipal Decree. The powers of the municipal councils have also been laid down in the Decree, the exercise of which are subject to the controlling powers of the Governor. Clause 46 of the Municipal Decree enjoins on the municipal councils to deliberate over the budget of the commune and in general all receipts and expenditure either ordinary or extraordinary, the mode of assessment, rates and rules regarding collection of all municipal revenue, except dock dues, and the deliberations of the Municipal Council shall only be enforced after the approval of the Governor in Privy Council. Clause 48 says that the Municipal Council shall always be required to give its opinion on certain matters, including the mode of assessment, rates and rules relating to levy of municipal tolls, dock dues and high road charges. Chapter III of the Municipal Decree deals with the budgets of the communes, divides receipt as ordinary and extraordinary, and by clause 54 the budget of each commune submitted by the Mayor and voted by the municipal council shall be finally approved by an Arrete of the Governor made in Privy Council. If the income of the commune is not sufficient to meet the compulsory expenditure which is detailed, provision shall be made under Clause 59 for an extraordinary tax introduced by an Arrete of the Governor made in Privy Council. By Clause 63, the special taxes due by the inhabitants or owners under the local rules or custom shall be distributed by deliberation of the municipal council approved by the Governor in council. By Clause 65, any taxpayer entered in the taxpayer's list of the commune shall be entitled to institute at his costs and risks with the authorisation of the Administrative Court, legal proceedings which are deemed by him to be incumbent upon the commune or section of commune and which the commune or section of the commune previously called upon to deliberate over the same would have refused or failed to institute. Whoever wants to institute legal proceedings against a commune or section of the commune shall be bound to address beforehand to the Governor a memorandum explaining. The submission of the memorandum to the Mayor shall suspend the barring by limitation and prevent the lapse. The Governor shall forward the memorandum to the Mayor with authorisation to convene the Municipal Council to deliberate over it. These particulars are found in Clauses 66 and 67 of the Municipal Decree. We have then Clause 79 which says that the provisions of the Decree dated 26th September, 1855 which was replaced by the Decree dated 30th December, 1912, dealing with the financial rules of the colonies shall be applied to the municipal accounts and to the municipal 'Receveurs in so far as they are not repugnant to the decree. These financial Rules dealing with the manner of assessment and recovery of tax, procedure and appeal, refund and remissions, shall *mutatis mutandis* apply to the Municipali-

ties as well as municipal Receveurs. Article 160 of these Rules. provides for the method of collection of direct taxes and other taxes, and deals with the assessment book, authority competent to assess and to approve the list and the details that should be given against each entry, the period within which the tax should be paid by the taxpayer, and also the period within which any claim against the assessment is to be preferred and the date on which any claim for payment of tax lapses. The assessment books are to be laid open to public and then entrusted to the Collector for the recovery of the taxes included therein. Article 161 deals with the method of recovery of direct tax, and the next Article provides for appeals against any claim in respect of any direct tax before the Administrative tribunal. Article 163 concerns itself with the method of recovery of indirect taxes, and Article 164 deals with appeals against any claim in respect of any indirect tax before a civil Court of competent jurisdiction. Remission or reduction in claims and complaints against double or false entry in respect of any tax, are to be dealt with under Articles 173 and 174. Article 183 lays down the procedure for the recovery of tax. Article 191 deals with appeals against any wrong assessment or against any assessment which is alleged to have been made in contravention of the resolutions made for the levy of any tax.

16. We have referred to the foregoing matters in detail to show the elaborate procedure controlling and regulating the whole matter of taxation from the stage of proposal to tax, until its collection, which serve as safeguards, not only from the standpoint of the municipal communes, but also the taxpayers. The municipal communes are not, having regard to the provisions of the Municipal Decree, free to pick and choose any tax for imposition, assessment and collection without going through the rigorous procedure, including previous assent and subsequent control of the Governor. This applies not merely to the selection of tax, but also its rate. In the circumstances, *K. T. Moopil Nair* v. *State of Kerala*[1], can have no application, which is a case where land tax was fixed on an arbitrary basis without classification and procedural control. Nor do we think that, notwithstanding the whole process of tax procedure envisaged by Municipal Decree, there is any sign of violation or likelihood of violation of either Article 19 (1) (g) or Article 14. In view of the external and internal control and the elaborate procedure, we reject the second contention of the petitioners as without any substance.

17. The third ground urged against the validating Act is that it violates section 7 of the Pondicherry (Administration) Act, 1962. We have already mentioned that this Act was enacted pursuant to the Treaty between the two Governments of India and France and the *de jure* merger of the French Settlements in India. The Act was made to provide for the administration of Pondicherry and for matters connected therewith. Section 3 speaks of officers and functionaries in relation to Pondicherry. Reference has already been made in this judgment to sections 3 and 4. The rest of the section we are not concerned with for the present purposes which relate to the extension of the jurisdiction of the High Court, to the erstwhile French Settlements, Advocates, rule making power of the High Court, limitation for appeals and power to remove difficulties. Actually, the Act was enacted and it received the Presidential assent before the Constitution (14th Amendment) Act, 1962, was made, which constituted the French Settlements as the Union Territory of Pondicherry, but effect was given to the Pondicherry (Administration) Act, 1962 and the Constitution (14th Amendment) Act from 16th August, 1962.

18. The administration of the Union Territories is governed by Part VIII of the Constitution. Union Territory shall be administered by the President, and he can act through an Administrator appointed by him. But, Parliament may, by law, provide otherwise. The President, as a matter of fact, has, in exercise of the power, appointed an Administrator for the Union Territory of Pondicherry. Under Article 239-A (1) and this we have already touched upon, Parliament enacted the Government of Union Territories Act, 1963, by which it provided for a Legislative

1. (1961) 2 S.C.J. 269 : A.I.R. 1961 S.C. 552.

Assembly and Council of Ministers for the Union Territory of Pondicherry. Section 18 defines the extent of the legislative powers. Subject to the provisions of the Act, the Legislative Assembly may make laws for the whole or any part of the Union Territory with respect to any of the matters enumerated in the State List or the Concurrent List in the VII Schedule to the Constitution. But, this is subject to the overriding powers of Parliament under sub-section (2) of section 18 to make laws with respect to any matters for a Union Territory or any part thereof, which is in consonance with Article 246 (4) of the Constitution by which Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State, notwithstanding that such matter is a matter enumerated in the State List. The Union Territory of Pondicherry is not a State, and the Legislature of Pondicherry is not a Legislative Assembly as contemplated by Article 54 or 163. It was so held in *S.K. Singh* v. *V.V. Giri*[1] and by a Division Bench of this Court, to which both of us were parties in W.P. No. 774 of 1974. The Pondicherry Legislature is but a creature of Parliament acting under Article 239-A.

19. In the light of the foregoing position, the contention of Mr. Venugopal is that sections 3 and 4 of the Validating Act are repugnant to, or derogate from section 7 of the Pondicherry (Administration) Act, 1962 which was made by Parliament, and section 21 of the Government of Union Territories Act, 1963. He refers us to *Amraoti Municipality* v. *Ramachandra*[2] and says the expression 'lawfully levied' in section 7 of the 1962 Act, means validly and actually levied. In that case, dealing with the expression 'may continue to be levied', in Article 277, it was pointed out that it only meant that the tax was one which was lawfully levied by the local authority for the purpose of the local area, the identity of the body that collected the tax, the area for whose benefit the tax was to be utilised, and the purposes for which the utilisation was to take place continued to be the same, and the rate of tax was not enhanced, nor its incidence in any manner altered so that it continued to be the same tax. It was pointed out that the word 'levied' meant 'was actually levied'. It is, therefore argued that since the tax authorised by the Validating Act does not come under section 7 which prohibits a new levy, section 4 afforded no power, and that since the Pondicherry (Administration) Act was an organic law made under Article 239-A, like the Government of Union Territories Act, 1963, the Validating Act made by the Pondicherry Legislature cannot override section 7 of the 1962 Act, and sections 18 (2) and 21 of the 1963 Act. The Validating Act, according to the petitioners not only violates section 7 but is repugnant to section 21. Section 3 of the Validating Act, it is said, inasmuch as it says 'notwithstanding the provisions of section 7 of the Pondicherry (Administration) Act', the section is not valid.

20. As held in *Vajensingji Joravarsingji* v. *Secretary of State for India in Council*[1], when a territory is acquired by a Sovereign State for the first time, that is an act of State, irrespective of how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all these cases, the Privy Council pointed out, the result is the same. The Privy Council went on:

> "Any inhabitant of the territory can make good in the Municipal Courts established by the new Sovereign only such rights as that Sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce those stipulations, in the Municipal Courts. The right to enforce remains only with the high contracting parties."

That applies to the erstwhile French establishments which by cession by Treaty, an act of State, became merged with India. It is in that background we have

1. (1970) 2 S.C.J 768 : A.I.R. 1970 S.C 2097.
2. (1964) 6 S.C.R. 947: A.I.R. 1964 S.C. 1166.

1. (1924) 51 I.A. 357 : 47 M.L.J 574: A.I.R. 1924 P.C. 216.

to view sections 4 and 7 of the Pondicherry (Administration) Act, 1962. So the position of Article 372 and 277 of the Constitution is different. 'Under Article 277, the existing taxes for purposes of the State, Municipality, district or a local area, which was being lawfully levied by them, may continue to be levied until provision to the contrary is made by Parliament by law.' But, section 7 which continues its existing taxes would 'apply until other provision is made by a competent Legislature or other competent authority'. It may be seen that there is nothing in section 7 which comes into conflict with sections 3 and 4 of the Validating Act. While section 7 enables continuance of taxes lawfully levied immediately before merger, it does not prevent the Pondicherry legislature which is a competent legislature, to enact section 3 and validate under its cover, the tax which had been actually collected before or after 16th August, 1962. Violation of section 7 of the Pondicherry (Administration) Act, or its repugnancy to section 18 (2) and section 21 of the Government of Union Territories Act, 1963, would arise only if the Validating Act contained any interdict contrary to the provisions of those sections in the Parliamentary enactments. That is not the case. In our opinion, the Validating Act was within the competence of the Pondicherry legislature, and on the principle of *United Provinces* v. *Atiqa Begam*[1], retroactive legislation, as the amending Act is within its power, and is valid. Like section 292 of the Government of India Act, 1935, section 7 of the Pondicherry (Administration) Act does not stand in the way of the Pondicherry legislature enacting retrospective legislation. This is in accord with *Mt. Jadab Bahuji* v. *Municipal Committee, Khandwa*[2], where it was observed following *United Provinces* v. *Atiqa Begam*[1] that the burden of proving that the Indian legislatures are subject to a strange and unusual prohibition against retrospective legislation lay upon those who asserted it. The third ground of the petitioners also fails.

21. It is next contended on their behalf that the Pondicherry legislature being a subordinate legislative body, cannot validly enact retrospective legislation. We are unable to agree. In *Queen* v. *Burah*[1] the Privy Council held :

> "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself."

This principle is clearly applicable to the powers of the Pondicherry Legislature. Its legislative powers are plenary within their ambit, except to the extent that they are limited by either the Pondicherry (Administration) Act, or the Government of Union Territories Act, 1963. Within the ambit of each of the legislative subject-matter, the Pondicherry legislature is supreme and its powers are plenary, which means that it is within its competence to make retrospective legislation. Within the sphere of legislative power, the power is exclusive on the related subject of legislation and it is supreme within the ambit of the competence. The Parliamentary control in this respect makes no difference to the principle that when the Pondicherry legislature acts within its limits, its powers are plenary. We cannot therefore, accept the contention that the Validating Act, in its retrospective operation, is invalid.

22. The last contention of the petitioners is that the Pondicherry legislature has no power to amend the pre-Constitution laws, namely, the Decree of 1880. This argument has only to be stated to be rejected. In *A.H. Abdul Shukoor and Co.* v. *State of Madras*[2], it was held that the State Legislature was free to enact laws which would have retrospective operation. The Supreme Court observed :—

> "Its competence to make a law for a certain past period, depends on its pre-

1. (1944) 1 M.L.J (Supp.) 65: A.I.R. 1941 F.C. 16.
2. (1962) 2 S.C.J. 518: A.I.R. 1961 S.C. 1486.

1. (1878) 3 A.C. 889.
2. (1965) 1 S.C.J 337 : (1964) 8 S.C.R. 217 : A.I.R. 1964 S.C. 1729.

sent legislative power and not on what it possessed at the period when its enactment is to have operation."

That is a sufficient answer to the petitioner's contention.

23. The appeals are accordingly allowed, and the writ petitions are dismissed. No costs.

Appeals allowed
S.J. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

The State Wakf Board represented by its Secretary .. *Appellant**

v.

The Indian Bank Ltd., Madras-1 and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 34, rule 1—Suits on foot of mortgages of immovable properties—Person claiming paramount title—Whether necessary party to the suit.

Order 34, rule 1 of the Code of Civil Procedure, dealing with suits relating to mortgages of immovable property provides that subject to the provisions of the Civil Procedure Code all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties in any suit relating to the mortgage. In so far as the mortgage security is concerned, it is the mortgagee who is primarily interested since he wants to recover the amount advanced on such security by bringing the property to sale after obtaining the decree on the foot of the mortgage. In this the paramount title-holder is not having any interest. Equally so, he has no interest in the right of redemption which survives to the mortgagor in such mortgage. Is a paramount title holder impleaded as a party to be therefore struck off from the pleadings without any further investigation into the quality of the situation or to the necessity of the occasion ? Though the primary principle is that such a paramount title-holder is neither a proper nor a necessary party to the mortgage action, yet each case has to be decided on its merits to find out whether such a party should be impleaded as a defendant in the mortgage suit along with the mortgagor. In order to avoid multiplicity of action and in order to secure quite a good marketable title over the property mortgaged and sought to be publicly sold the investigation into the title of the hypotheca becomes reasonably necessary and indeed equally important and it is in this context and perspective that the technique of procedure should be buttressed to some extent so that justice may be done in cases where such investigation of title comes up for consideration though incidentally. In certain circumstances the Court has the discretion to allow the mortgagee to implead a person setting up a paramount title which activity is more for the benefit of the mortgagee who would very much desire that every conflict as to title may be finally settled before he could enforce his decree for mortgage if one is obtained by him ultimately. [*Para.* 6.]

Cases referred to:—

Veeraraghavalu v. *Suryanarayana*, (1936) 43 L.W. 525 : 163 I.C. 303: A.I.R. 1936 Mad. 338; *Kasi Chettiar* v. *Ramasami Chettiar*, (1937) 2 M.L.J. 165 : 44 L.W. 706 : A.I.R. 1937 Mad. 176; *Ramaswami Pillai* v. *Marimuthu Gounder*, A.I.R. 1928 Mad. 764.

Appeal against the decree of the City Civil Court (II Additional Judge), Madras dated 4th April, 1970 in Original Suit No. 2738 of 1968.

M.A. Sathar Sayeed, S. I. Samiulloh and *S.M. Hameed Mohideen,* for Appellant.

Aiyar and *Dolia* and *S. Pl. Palaniappa,* for Respondent

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—Three suits were tried together by the II Additional Judge, City Civil Court, Madras, but we are here concerned with O.S.No.2738 of 1968. This suit was filed by the Indian Bank on the foot of two mortgages Exhibits A-1 and A-4 dated 27th April, 1951 and 27th June, 1951. Under these mortgages the first defendant Fathimunnissa Begum

* A.No. 522 of 1971.

20*th November*, 1975.

purported to mortgage the land and the superstructure on it compendiously described in the schedule to the plaint as house, ground and premises bearing old door No. 354, new door No. 37, Poonamallee High Road, Aminjikarai, Madras, bearing survey No. 70/5 in the Registration District of Madras-Chingleput and Sub-registration District of Sembium. In connection with the said two mortgages, two promissory notes Exhibits A-2 and A-3 were also executed by the first defendant and her father. The bank's case is that they were satisfied on inspection of the title deeds produced by the first defendant in relation to the suit property that she had a good title thereto and it was in that context they advanced the mortgage amounts of Rs. 10,000 and Rs. 8,000 respectively under Exhibits A-1 and A-4. It is common ground that the documents filed on the date when the suit was instituted were the mortgage deeds and the promissory notes. In the course of the trial however two other documents Exhibits A-28 and A-29 were also filed as if they were title deeds which reflected the title of the mortgagor over the suit properties. As usual there was a covenant in the above deeds of mortgage which enabled the bank to bring the properties privately to sale under section 69 of the Transfer of Property Act. When an attempt was made to auction the property privately to realise the mortgage money, printed bit notices were circulated thwarting the bidders from bidding at the auction and purchasing the same. This necessitated the plaintiff to file the present action on the said two mortgages and seek for the sale of the hypotheca for the realisation of the mortgage money. It would only implead the mortgagor and would say that her father who was a co-promisor under the promissory notes died and that the bank was not able to trace the names of his heirs apart from the first defendant. As public notices were given about the suit property as being wakf property, the plaintiff bank caused the notices to be served on the Wakf Board and impleaded them as a party, as the second defendant to the action. The first defendant remained ex-parte and did not even file a statement. The second defendant's case was that the land on which the superstructure stands was always considered and treated as wakf property it having been assigned by the State Government for purposes of erecting a junda called Nagoor Meera Jundah and contemporaneously to allow the Muslims of the locality to celebrate a day when the famous saint at Nagoor was interred. According to them such an assignment was made under Exhibits B-1 and B-2 and that the first defendant's father himself under Exhibit B-3 and B-4 would impliedly confess that the suit land was always treated as property validly dedicated for religious purposes and for the benefit of the Muslim residents of the locality. According to the second defendant the superstructure also was put up from and out of the collections made from the Muslim public and that they were not aware of the mortgage created by the first defendant over the entirety of the suit property. They claimed that as the first defendant had no right, title or interest over the property at any time, the mortgage effected by her in favour of the plaintiff cannot be held to be valid and in the circumstances no interest in the property known to law could have been transferred by the first defendant in favour of the bank. They therefore sought for a dismissal of the suit.

2. The plaintiff formally examined the witness P.W.1 to prove the mortgage. On the side of the defendants, as the two other suits were tried in common three witnesses were examined. On a perusal of the oral and documentary evidence, the learned Judge came to the conclusion that the suit property is not wakf property and that the first defendant as the executant of the mortgages Exhibits A-1, and A-4 was competent to so execute them securing the suit property in consideration of the mortgage amount lent by the bank. It is as against this the present appeal has been filed by the Wakf Board represented by the Special Officer for Wakf.

3. The learned counsel for the appellant referred to the documentary evidence in the first instance. Exhibit B-2 is a gramanatham plan showing the allotment of plots in Survey No. 70/5 and in No. 76, Aminjikarai village. We have examined the original and we found that the north-western corner of the land consisting of 8 cents with masonry walls was recommend-

ed by the Tahsildar for assignment for the benefit of the Muslims and in connection with the jundah. It is common ground that jundah referred to here is the festival of the erection of flags in connection with the prayers offered on the day when such prayers are offered at Nagoor which is one of the primary religious centres in South India in connection with the internment of the foremost preacher amongst the Muslims. The next documentary evidence referred to by the learned counsel is Exhibit B-1 dated 30th August, 1925. Here the reference is based on the Tahsildar's report. After informing himself with the connected literature from the other connected papers the Deputy Collector, Saidapet ordered the assignment of a part of the land in favour of the Mohamedans who are described as persons who were occupying the relevant plot for the jundah festival. Of course it has to be said that there has not been a meticulous description in this document regarding the scope of the assignment and the grant of it. But on an examination of Exhibits B-1 and B-2 which are ancient documents, it cannot be seriously objected that the land was assigned by the Government for the benefit of the Muslim community in connection with the Nagoor jundah festival. The learned counsel for the appellant also referred to Exhibits B-3 and B-4. The former is dated 6th January, 1926 and the latter dated 19th January, 1926. The writer of Exhibit B-3 is none else than the father of the first defendant. He would also refer to the suit land as the place where the Nagoor jundah festival was conducted. For reasons which are not clear, he wrote a letter to the Collector of Chingelput District undertaking that he would not build up a mosque in the Nagoor Meera Swami jundah land S.No. 70/5, Plot No. 1, Aminjikarai village. Consequent upon such an undertaking the Revenue Divisional Officer of Saidapet under Exhibit B-4 recorded the same and allowed the usual procession with music and tom tom in Perumal temple which is situate very near Nagoor Meera Swami jundah land. When this was the position, it appears that the first defendant, taking advantage of the fact that her father was looking after the affairs of this jundah festival inducted herself into the property and put up exclusively the superstructure on it presumably from her own funds. In order to regularise her title she obtained certain documents to which we shall presently refer. But the appellant's case is that the superstructure was raised from the funds collected from the Muslims of the locality and that therefore the first defendant or her predecessors-in-interest did not have any interest in it. D.W. 1 was the muthavalli of the Aminjikarai mosque who was examined principally in the other suit, which was tried in common. But when cross-examined by the appellant in the trial Court he would admit that the properties mortgaged by the first defendant belong to the Nagoor Meera Swami land and the plot was granted by the Collector for that specific purpose. He would hesitantly add that the Nagoor Meera Swami jundah property, meaning thereby the superstructure on the land, was also put up with bricks given by the carts which were passing through the land. D.W. 1 was cross-examined by the bank also. He would say that what he meant by 'wakf' was property where four persons would come for namas. He would admit that he was not present when the first defendant put up the building; but would assert that at all times the lands belonged to the Nagoor jundah. When pursued further he would admit that worshipping flag is said to be not religious but sometimes worship of the flag is said to be religious.

4. D.W. 2 is the wakf inspector. He joined service in 1965 and therefore he did not have any personal knowledge about the nature of the suit property prior to that date. He can only speak from records and we have already traced such records on which the appellant rests its claim. He would in cross-examination say that he was not aware as to who put up the superstructure and that he was not aware of any Gazette notification including the suit property as wakf property. It was however brought out from this witness that the festival of Nagoor is held on the same date as on the date when the jundah was hoisted in the suit land for the purposes of worship. He also incidentally says that the Wakf Board did not collect any rent from the tenants in occupation of the superstructure. Though the first defendant did not file the statement and remained ex parte D.W. 3 her husband

was examined on the side of the defendants. He would say that the property was in possession of his father-in-law and the superstructure was put up by him (father-in-law) and the entirety of the suit property was kept by his wife from her mother. He speaks of considerable improvements made by him and his wife from time to time. He referred to Exhibits A-28 and A-29 as the prior title deeds of the properties and would rely upon Exhibit A-36 which is the assessment order of the Corporation of Madras relating to the superstructure bearing No. 37, Poonamallee High Road, Aminjikarai, Madras. When cross-examined he would say that he applied to the Chief Kazi for his opinion presumably for the purpose of eliciting information whether the jundah festival is a religious one. D.W. 3 did not categorically say one way or the other what the opinion of the Chief Kazi was. He denied that the suit properties were however used as wakf properties. The plaintiff on the other hand relied upon Exhibits A-28 and A-29 and also the orders of the Corporation of Madras assessing the suit properties for purposes of establishing that it was *bona fide* satisfied about the title of the first defendant to the suit land. Exhibit A-28 is a release deed in favour of the first defendant by her relations. A.29 is a deed of mortgage executed by one of the releasors under Exhibit A-28 in favour of the Madras City Co-operative Bank Ltd.. Exhibit A-29 however was a mortgage in relation to property bearing municipal door No. 534, Poonamallee High Road, Aminjikarai, Madras. In the release deed Exhibit A-28 the description of the property is given thus:—Eight cents of nattam vacant land in Survey No. 70/5, Plot No. 1, situated in the village of Aminjikarai, Saidapet Taluk, Chingleput District, bounded on the west by Perumal Coil Back Lane, on the East by Parthasarathi Naidu's house and Varada Reddi's vacant land, on the south by vacant land of Perumal Coil and on the North by Poonamallee High Road, Sembiam Sub-District. There is no reference to the superstructure at all. Whether there was a superstructure in 1938 or not is not clear. But one doubts whether house and ground and premises No. 534, Poonamallee High Road, Aminjikarai, Madras, dealt with in Exhibit A-29 is the same which was dealt with under Exhibit A-28 at all. Further in Exhibit A-29 the western boundary is described as jundah and Shaick Sumurheedeen Sahib Street. This by itself implies to the west of the property mortgaged under Exhibit A-29 there was a vacant land used for the jundah festival. It is in this light we entertained a doubt whether the properties comprised in Exhibit A-29 and Exhibit A-28 are identical. Assuming that they are the same the defendant's case is that on a verification of such a document and after being informed that the superstructure was assessed to property tax as is seen by the relevant exhibits filed and after being satisfied that there is no encumbrance on the property between 1939 and 1951 they lent the money *bona fide* believing that the first defendant was the owner of the property.

5. From the assessment of the oral and documentary evidence in this case it is clear that as early as 1925 the suit land was assigned by the Government for purposes of the jundah festival in connection with the Nagoor Meera Swami. This is not even denied, as it cannot be, by the counsel for the respondent. But what he says is that the erection of jundah or the flag in connection with the festival which is taking place outside the locality cannot be accepted as a permanent dedication nor would it be a wakf within the meaning of Wakf Act of 1954. Section 3 (1) of the Wakf Act defines a wakf as meaning a permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable. It is impossible to say in the instant case that the assignment of the land specifically made in favour of the Muslim community in the locality for purposes of and in connection with the jundah festival which in turn is intimately connected with the festival which is held at Nagoor is not for a pious or a religious purpose within the meaning of section 3 (1) (*v*). Further section (2) takes into its fold all those wakfs whether created before or after the commencement of the Act. But on a fair reading of Exhibits B-2 and B-1 whose terms are explicit and clear, we are of the view that the State permanently granted the land

in question for the pious and religious purposes of conducting the jundah which in turn is connected with the Nagoor festival in East Thanjavur. If therefore this position is fairly clear, the question is what was the interest in the property which was obtained under section 58 of the Transfer of Property Act by the bank when the mortgage was executed. No doubt the description given in Exhibit A-1 and A-4 is house, ground and premises bearing old door No. 354, new door No. 37, Poonamalle High Road, Aminjikarai, Madras. It is necessary at this stage to find whether the case of the appellant that they contributed funds to the putting up of the superstructure on the land is acceptable or not. Excepting for a light and a bare suggestion made by D.W. 1 that bricks were collected from the carts passing along the mosque for the purposes of putting up the superstructure there is absolutely no title of evidence to show that the public money or moneys were utilised for purpose of putting up the superstructure over the land which is the subject-matter of the assignment under Exhibits B-2 and B-1. If this position is reached then we should bear in mind the dichotomous character between the land which is the subject-matter of the appeal under Exhibits B-2 and B-1 and the superstructure put upon it as suggested by the first defendant by her or by her ancestors. It is seen that the first defendant or her ancestors were dealing with these properties as seen from Exhibits A-28 and A-29 and were paying the property tax due to the Corporation of Madras under various assessment orders made by it; the normal presumption would be that the superstructure was not only possessed by the first defendant or her ancestors but was enjoyed by them at all material times.

6. Under Exhibits A-1 and A-4 the entirety of the property was the subject-matter of the mortgage. Though in a mortgage action the mortgagee is not bound to recognise paramount title and implead such persons claiming such title over the hypotheca, yet the plaintiff invited a decision on such title by impleading the Wakf Board as a party-defendant to the suit. There was a conflict of opinion as to whether the party claiming such paramount title is a necessary party at all under Order 34, rule 1, Civil Procedure Code. Order 34, rule 1 dealing with suits relating to mortgages of immovable property provides that subject to the provisions of the Civil Procedure Code all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. We are not reproducing the Explanation as it is not necessary. The question is whether a person claiming the paramount title to the entirety of the hypotheca is a person who can be said to be interested either in the mortgage security or in the right of redemption. In so far as the mortgage security is concerned, it is the mortgagee who is primarily interested since he wants to recover the amount advanced on such security by bringing the property to sale after obtaining the decree on the foot of the mortgage. In this the paramount title holder is not having any interest. Equally so he has no interest in the right of redemption which survives to the mortgagor in such mortgage. Therefore the question is whether if a paramount title holder is impleaded as a party he should be struck off from the pleadings without any further investigation into the quality of the situation or to the necessity of the occasion. Though the primary principle is that such a paramount title-holder is neither a proper nor a necessary party to the mortgage action, yet each a case has to be decided on its merits to find whether such a party should be impleaded as a defendant in the mortgage suit along with the mortgagor. In order to avoid multiplicity of action and in order to secure a quite good marketable title over the property mortgaged and sought to be publicly sold the investigation into the title of the hypotheca becomes reasonably necessary and indeed equally important and it is in this context and perspective that the techniques of procedure should be buttressed to some extent so that justice may be done in cases where such investigation of title comes up for consideration though incidentally. That this is the principle or rule has been laid down by our Court in *Veeraraghavalu* v.

Suryanarayana[1]. Venkataramana Rao, J., dealing with a similar situation after noticing the general principle that it is not essential to implead a person setting up the paramount title in a mortgage action observed as follows:

> "But in each case the Court can exercise its discretion whether it will lead to inconvenience or confusion in trying the issue as to paramount title in the same suit........................
> It is very desirable that before the property is brought to sale all questions of title relating to the mortgaged property should be settled and the Court should as far as possible avoid multiplicity of litigation. The effect of joining persons who claim a title paramount need not necessarily result in a dismissal of the suit. The Court can order a separate trial.
>
> It is desirable that such a question should not be gone into in the suit. But when such a question has been gone into by the trial Court the appellate Court should not reverse the decision of the trial Court on that ground alone unless the decision has affected the juris diction of the Court or caused a preju- dice to the parties by the trial on the merits."

In *Kasi Chettiar* v. *Ramaswami Chettiar*[2], a Division Bench of our Court presided over by Varadachariar, J., reiterated in a slightly different way the above principle. The learned Judge has said that the question whether the issue of title paramount should or should not be decided in a mortgage suit was dependent on the facts of each particular case. We may also refer to a passage which is very apposite to the one quoted by Venkataramana Rao, J. in *Veeraraghavalu* v. *Suryanarayana*[1], but culled out from *Ramaswamy Pillai* v. *Marimuthu Gounder*[3]. The effect of joining a person who claims title paramount need not necessarily result in the dismissal of the suit as against him. Whilst therefore approving the ratio, it may be stated that in certain circumstances the Court has the discretion to allow the mortgagee to implead a person setting up a paramount title which activity is more for the benefit of the mortgagee who would very much desire that every conflict as to title may be finally settled before he could enforce his decree for mortgage if one is obtained by him ultimately.

7. In the instant case the mortgagee rightly impleaded the Wakf Board. The learned counsel for the respondent however wishes to make a point on such an addition of the party and would on the observations of our Court in *Ramaswamy Pillai* v. *Marimuthu Gounder*[1], submit that in a mortgage suit the title of a party paramount to that of the mortgagor and the mortgagee cannot be enquired into in law. This opinion of Ramesam, J., has been whittled down in the same judgment by the observation of Reilly, J., that the plea of paramount title was open to the defendant. For a greater reason the force of the emphatic statement, made by Ramesam, J., is considerably lessened by the subsequent decisions in *Veeraraghavalu* v. *Suryanarayana*[2], and of the Division Bench in *Kasi Chettiar* v. *Ramaswami Chettiar*[3]. We therefore hold that the second defendant was a necessary party to the mortgage action, in the circumstances of the case.

8. What survives therefore is as to what was the interest in immovable property which the first defendant transferred under section 58 of the Transfer of Property Act. When she executed the two mortgages Exhibits A-1 and A-4 we have no hesitation in holding that she could have only mortgaged the superstructure which as we said might have been put up by her but certainly not by the Wakf Board or their predecessors-in-interest. The hypotheca in the circumstances could only be understood as a superstructure over the land which was permanently dedicated under the orders of assignment of the State made under Exhibits B-2 and B-1. The mortgage security therefore cannot include the land which is plot No. 1 in Survey No. 70/5 in Aminjikarai, Madras.

1. (1936) 43 L.W. 525: 163 I.C. 303: A.I.R. 1936 Mad. 338.
2. (1937) 2 M.L.J. 165: 44 L.W. 706: A.I.R. 1937 Mad. 176.
3. A.I.R. 1928 Mad. 764.

1. A.I.R. 1928 Mad. 764.
2. 43 L.W. 525: 163 I.C. 303: A.I.R. 1936 Mad. 338.
3. (1937) 2 M.L.J. 165: A.I.R. 1937 Mad. 176.

This plot is more fully described in Exhibit B-2. We therefore disagree with the Court below that this plot of land was never treated and accepted as wakf property. In the light of the documentary evidence it has to be held that the eight cents of land delineated in Exhibit B-2 as land assigned to the Muslims for purposes of jundah festival should de declared to be wakf property within the meaning of section 3 (1) of the Wakf Act 1954.

In the result therefore the appeal is allowed in part and the plaintiff-bank would be entitled to proceed against the superstructure bearing municipal door No. 37, Poonamallee High Road, Aminjikarai, Madras for purposes of realising the amounts under the mortgage decree besides having the usual personal decree against the first defendant. The usual decree shall be drafted in terms of the judgment as above enabling the bank to proceed only as against the superstructure. The appeal is allowed with costs.

R.S. — *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Suryamurthy, J.*

A. Subramaniam Chettiar .. *Petitioner**

v.

Shanmugham and others .. *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 10 (3) (a)—Petition for eviction—Non-residential premises—Owner's occupation—Partnership deed produced by landlords at trial—Whether bona fide.

The landlords filed a petition for eviction of the tenants on the ground that they required the premises for their own business. At the time of trial, they produced a partnership deed to show that they intended to carry on their business as partners. The eviction was ordered and confirmed by the Appellate Authority. The tenants filed a revision contending that the filing of the partnership deed changed the frame of the petition.

Held, If it was found that the landlords *bona fide* required the premises for their own use and for conducting their own business, it was not for the tenant to impugn the right of the landlords to carry on business either as joint family business or as a partnership business. The partnership deed had been produced obviously only as a piece of evidence to prove that the landlords *bona fide* required the premises. [*Para.* 2.]

Petition under section 25 of Act XVIII of 1960 praying the High Court to revise the order of the Court of Small Causes (II Judge) Madras, dated 18th April, 1975 and made in H.R.A. No. 497 of 1974 (H.R. C. 3001 of 1973, Court of Small Causes, VIII Judge, Madras.)

N.S. Raghavan, for Petitioner.

P.K. Sivasubramanian, for Respondents.

The Court delivered the following

JUDGMENT.—This is a civil revision petition against the order of the Appellate Authority, confirming the order of the Rent Controller directing the eviction of the tenant, who is the revision petitioner herein.

2. The petition was filed by the landlords, Shanmugham, Saravanan, Sundaramurthy and Palani, for eviction of the tenant, Subramaniam Chettiar from the premises, bearing door No. 224/226, Rasappa Chetty Street, Madras-3 on the ground that they required the premises for their own use. The building is a non-residential building. The tenant is said to be carrying on certain business in the said premises. The building originally belonged to one Arumugham Chettiar, grandfather of the respondents herein. By a deed dated 5th March, 1948, Arumugham Chettiar created a Trust and appointed his daughter-in-law, Dharmavardhani Ammal and Shanmugham, his eldest grandson as Trustees. The Trustees were directed to manage and maintain the properties and defray the expenses of the education of the grandchildren of the donor. After meeting such expenses from out of the income of the properties, the balance was to be added to the income of the Trust. After

* C.R.P. No. 1285 of 1975. 17th March, 1976.

the death of Dharmavardhani Ammal, the four grandsons of the donor and their sons were to become absolutely entitled to the properties. Dharmavardhani Ammal is now dead. Therefore, the respondents herein have become the absolute owners of the properties. They would appear to have filed a petition formerly for the eviction of the tenant from the same premises. That petition is said to have been withdrawn. Thereafter, they have filed this petition for eviction of the tenant, contending *inter alia* that they are carrying on a business in iron and steel in a building which they had taken on rent and that they require the premises for their own use and occupation for the conduct of that business. The Rent Controller and the Appellate Authority found that the requirement of the landlords was *bona fide*. It is now contended by the learned counsel for the revision-petitioner that in the course of the trial the landlords have filed a partnership deed, *viz.*, Exhibit P-4, that this partnership deed shows that the landlords intend to carry on their business as partners, that this changes the frame of the petition and that therefore, they are not entitled to maintain the petition in its present form. I am unable to agree with this contention. If it is found that the landlords *bona fide* require the premises for their own use and for conducting their own business, it is not for the tenant to impugn the right of the landlords to carry on the business either as a joint family business or as a partnership business. The partnership deed has been produced obviously only as a piece of evidence to prove the *bona fides* of the landlords. The tenant, in the course of the oral evidence, admitted that the landlords were carrying on a similar business in iron and steel in door No. 269, Rasappa Chetty Street under the trade name and style of M. Arumugham Chetty and Saravana Steel Traders. This business is also said to be carried on as a partnership business by the four respondents herein. It is not disputed that the building in which the business of the respondents is now conducted is a rented building. Therefore, the learned Rent Controller and the learned Appellate Authority were perfectly right in coming to the conclusion that the landlords *bona fide* require the premises. Hence the order of the learned Rent Controller, as confirmed by the learned Appellate Authority is confirmed and this civil revision petition is dismissed with costs.

3. The tenant is, however, granted four months' time to vacate the premises on condition that he should deposit in Court the arrears of rent, if any, within 15 days from this date and continue to pay the rent without any default till he vacates.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao, J.*

Basheer Ahamed Khan and another .. *Petitioners**

v.

T. M. Krishna Chetty .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 11—*Provisions under section* 11—*Whether can be invoked in revision to the High Court.*

The High Court in exercising jurisdiction vested in it under the Tamil Nadu Buildings (Lease and Rent Control) Act has a right to invoke each and every provision of the said Act for the purpose of successful conclusion of the hearing and also for the purpose of rendering justice as between the parties to a proceeding in accordance with the codified law as set out in the Act. One such provision in the Act is the right vested in the Rent Controller or the Appellate Authority, as the case may be, to stop further proceedings and make an order directing the defaulting tenant who fails to pay rent to put the landlord in possession of the building. Such jurisdiction can be exercised by the High Court as well while it deals with a revision petition under section 25, and it can entertain an application under section 11 of the Act of 1960 made by the landlord at the revisional stage. [*Para.* 2.]

Cases referred to :—

Abdul Khader v. *Hussain Ali,* (1962) 2 M.L.J. 446; *Nataraja Asari* v. *Balasubramaniam,*

* C.R.P. Nos. 649 and 650 of 1975.
9*th April,* 1976.

(1957) 2 M.L.J. 492 ; *L. Chettiar* v. *K. Subbarayan*, 83 L.W. 696: A.I.R. 1971 Mad. 163.

Petition under section 25 of the Madras Buildings (Lease and Rent Control) Act XVIII of 1960 as amended by Act XXIII of 1973 praying the High Court to revise the decrees of the Court of the Appellate Authority (District Judge) Dharmapuri at Krishnagiri, dated 16th December, 1974 and passed in C.M.A. Nos. 29 and 30 of 1974 respectively. (H.R.C.O.P. Nos. 1 and 3 of 1973, District Munsif, Hosur respectively).

T.V. Balakrishnan, for Petitioners.

T.R. Rajagopalan and *T.R. Rajaraman*, for Respondent.

The Court delivered the following

JUDGMENT :—Though no doubt the petitioners before me who are the tenants can successfully challenge the order of the appellate authority for the reason that the appellate authority relied on a decision which has since been overruled by this Court, yet the case has taken a different turn in the course of the proceedings and therefore it has become necessary for me to state a few facts. The landlord sought for eviction of the petitioners on the ground that he wanted the premises in his occupation for his own non-residential purposes. The landlord's case was that he was expanding his business and therefore there was necessity for the request. It is a common ground however that the landlord was carrying on a business of his own in a building of his own. The Rent Controller would not grant the request. But the appellate authority relied upon a decision of this Court in *Abdul Khader* v. *Hussain Ali*[1] and *Nataraja Asari* v. *Balasubramaniam*[2]. These have been overruled by a Division Bench of our Court in *L. Chettiar* v. *K. Subbarayan*[3]. But it appears that another Division Bench of our Court took a different view. But in the light of the conclusion which I intend reaching, it is not necessary for me to go further on this question. *Prima facie*, and on the reasoning of the decision in *L. Chettiar* v. *K. Subbarayan*[1], the petitioners are entitled to succeed. In the course of the hearing of the case the landlord-respondent filed two applications in these two revision petitions seeking for stay of all further proceedings since the petitioner in each of these cases has failed to pay the rent due in the course of the hearing. That the petitioners have fallen into arrears in the matter of payment of the rent is not in dispute. But what is said is that the respondent has already filed a suit for the recovery of the same and therefore the impact of section 11 of the Tamil Nadu Buildings (Lease and Rent Control) Act need not be invoked, in the particular circumstances of the case. The second argument is that such a contention can be raised only before the Rent Controller or the appellate authority and not in the High Court when it is exercising jurisdiction under section 25 of the Act.

2. In so far as the last contention is concerned, I am of the view that as the High Court is exercising jurisdiction under the very Act and as it has been vested with such jurisdiction under it, it has a right to invoke each and every provision of the said Act for purposes of a successful conclusion of the hearing and also for the purpose of rendering justice as between the parties in accordance with the codified law as set out in the Tamil Nadu Buildings (Lease and Rent Control) Act. One such provision in the Act is the right vested in the Rent Controller or the Appellate Authority, as the case may be, to stop further proceedings and make an order directing the defaulting tenant who fails to pay rent to put the landlord in possession of the building. As in my view, such jurisdiction can be exercised by the High Court as well while it deals with revision petitions under section 25, the argument of Mr. Balakrishnan that this Court cannot entertain the application under section 11 made by the landlord at the revisional stage is not impressive and I am unable to accept it.

3. As regards the information brought to the notice of this Court by the application made before me under section 11, that the petitioner-tenants have failed to pay or deposit the arrears of rent as claimed by

1. (1962) 2 M.L.J. 446.
2. (1957) 2 M.L.J. 492.
3. 83 L.W. 696: A.I.R. 1971 Mad. 163.

1. 83 L.W. 696: A.I.R. 1971 Mad. 163.

the landlord, there is no dispute regarding such accumulation of arrears. There is certainly no dispute that such arrears of rent have not been paid. The petitioners were given ample opportunities to pay the rent or otherwise to show sufficient cause for compelling the Court not to invoke its jurisdiction under section 11 (4). The tenant in each of these revision petitions has not availed himself of the said opportunity given by this Court. The position therefore is that the petitioners are in arrears of rent and they have not shown sufficient cause for such non-payment of rent. In those circumstances, in exercise of jurisdiction conferred on this Court under section 11 (4) of the Tamil Nadu Buildings (Lease and Rent Control) Act of 1960 all further proceedings are stopped. The result is that the petitioner in each of these revision petitions is directed to put the landlord in possession of the portion of the building in their occupation. The revision petitions are dismissed. There will be no order as to costs. Learned counsel for the petitioners requested for sometime to deliver vacant possession. Each of the petitioners is granted three months' time to vacate.

R.S. —— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Mohan, J.*

Hindustan Aluminium Corporation Ltd. .. *Plaintiff**

v.

Nainsukhdas Baldeodas by partner Premnarain Daga .. *Respondent.*

Arbitration Act (X of 1940), section 34—Application for stay of legal proceedings—Requisites for exercise of discretion—Six contracts—Arbitration agreement using the word "shall" regarding two contracts and "may" regarding rest—Effect—Suit filed after notice—No written statement—Stay application made—"At any time before filing of written statement" in section 34—Meaning.

Where the intention of the parties was that the matter was to be referred to arbitration, difference in language, by the use of the word 'shall' in the first clause and 'may' in the second clause of the arbitration agreement will not preclude grant of legal proceedings in a fit case irrespec- of stay tive of the language used.

[*Para.* 1.]

Under section 34 of the Arbitration Act, the readiness and willingness of an applicant for stay of legal proceedings to do everything necessary for the conduct of the arbitration must exist not only at the time of the application for stay but also at the commencement of the legal proceedings. Writing letters long after the suit had been filed requesting reference to arbitration is not "readiness and willingness" as contemplated in the section.

[*Paras.* 4 *and* 5.]

The provision in section 34 for filing application for stay "at any time before filing of written statement" signifies that the application for stay must be made promptly and before the last date fixed for filing the written statement under the provisions of the Civil Procedure Code or the rules of the Court. Hence where the written statement was not filed before the date fixed, even assuming that the defendant had entered appearance and prayed for time only to file an application for stay, the defendant's conduct would amount to circumventing the statutory provision in section 34 and in such a case discretion should not be exercised in his favour. [*Para.* 6.]

Cases referred to:—

Jyoti Brothers v. *Durga Mining Company*, A.I.R. 1956 Cal. 280; *Shroff Brothers* v. *Bisheswar Dayal Meatle*, A.I.R. 1974 Cal. 352; *Food Corporation of India* v. *Messrs. Thakur Shipping Company and others*, A.I.R. 1975 S.C. 469; *Middle East Trading Company, Bombay* v. *The New National Mills Ltd., Ahmedabad*, A.I.R. 1960 Bom. 292.

P. V. Subramaniam, for Plaintiff.

V.R. Nagarajan and *P. Haridas*, for Respondent.

The Court delivered the following

JUDGMENT.—This is an application seeking stay under section 34 of the Arbitration Act hereinafter referred to as "The Act". With regard to the six contracts forming the subject-matter of the suit, items 1 and 3

* C.S. No. 128 of 1974 and App. No. 576 of 1975. 7th August, 1975.

are governed by the arbitration agreement, the wording of which is as follows :

"........shall, in the first instance, be referred to arbitration of the Indian Chamber of Commerce, Calcutta...."

With regard to the contracts relating to items 2, 4, 5 and 6 of the plaint Schedule, the relevant clause is to the effect :

"........may, in the first instance, be referred to arbitration of the North India Chamber of Commerce, Allahabad............"

Notwithstanding the difference between the first and the second clauses in so far as the first using the word 'shall' and the second containing the word 'may', this is a fit case where a stay ought to be granted irrespective of the language used, because the intention of the parties was that the matter should be referred to arbitration.

2. This is opposed by the respondent stating that though the suit notice was given as early as 22nd November, 1973, there was no reply from the defendants (applicant). Merely because the arbitration clause concerning items 1 and 3 of the plaint schedule contract states 'shall' it does not mean, straightaway, that the discretion of the Court under section 34 should be exercised especially when the value of these two contracts comes to only Rs. 17,407 91 and in such a case, the claim of the plaintiff should not be split up and one portion alone should not be referred to arbitration. The matter came up on the undefended board on 9th October, 1974, consequent on the failure of the defendant to file the written statement in time, and in such a case, they cannot pray that the discretion under section 34 may be exercised in their favour. There is not even an averment in the affidavit in support of the application for stay about the readiness and willingness to submit to arbitration. In support of these contentions, reliance is placed on *Jyoti Brothers* v. *Durga Mining Co*[1], *Shroff Brothers Bisheshwar Dayal Meatle*[2] *Food Corporation of India* v. *Messrs. Thakur Shipping Co. and others*[1] and *Middle East Trading Co., Bombay* v. *The Neu National Mills Ltd., Ahmedabad*[2].

3. In order to appreciate the respective contentions, a few dates require to be noted. From the summons issued, I find that the defendants were served on 16th August, 1974 and the suit appeared on the undefended board on 9th October, 1974. It is the representation of the learned counsel for the applicant that on that date, he appeared before the Court and represented that he was going to prefer an application under section 34. On a perusal of the records, I am unable to see any endorsement to this effect, since the two endorsements are :

"Written statement not filed—Submitted on 1st November, 1974" and
"110295 for stay of all further proceedings in the suit numbered as "A 576 of 1975—27th February, 1975 adjourned to 20th March, 1975."

Under these circumstances, whether the defendants entered appearance and prayed for time to file written statement or not, is a moot question. But, that need not detain us. The two clauses relating to Arbitration, use the words 'shall' and 'may'. As regards the contracts relating to items 1 and 3, notwithstanding the use of the word 'shall', I see no reason why the discretion under section 34 must be exercised in favour of the applicant. In this context, the observation in *Jyoti Brothers* v. *Shree Durga Mining Co.*[3], are relevant which is as follows :

"Where an arbitration clause is : In the event of any dispute arising out of this contract the same can be settled by arbitration held by a Chamber of Commerce at Madras, the clause means that after a dispute has arisen, the parties have further to agree that their dispute shall be referred to arbitration and then to decide also which Chamber of Commerce at Madras. But the arbitration clause as it stands is not an arbitration agreement and is not a present contract to submit disputes to arbitration. The word 'can' in the clause cannot be construed as a kind of

1. A.I.R. 1956 Cal. 280.
2. A.I.R. 1974 Cal. 352.

1. A.I.R. 1975 S.C. 469.
2. A.I.R. 1960 Bom. 292.
3. A.I.R. 1956 Cal. 280.

an option given to either of the contracting parties."

4. This case fully applies to the arbitration clause relating to items 2, 4, 5 and 6 of the plaint schedule. But, as regards items 1 and 3, I do not find even a formal averment, which has been held to be an essential requisite for a person seeking stay under section 34, about his readiness and willingness to submit to arbitration. I am fortified in my conclusion by referring to the decision in *Middle East Trading Co., Bombay* v. *The New National Mills Ltd., Ahmedabad*[1], wherein it was laid down as follows :

> "It is also necessary that he should satisfy not only that he is but also was at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration. Such an averment is all the more necessary in a case, where even though plaintiffs had given notice to the defendants of their intentions to take legal steps the defendants did not reply nor stated that the dispute between them should be referred to arbitration."

The position is somewhat similar in the instant case. I am unable to appreciate the distinction sought to be made out by the learned counsel for the applicant, that the notice dated 22nd November, 1973 did not clearly indicate that legal proceedings were about to commence and what is demanded therein was the delivery of the goods. Certainly, that notice should have put him on the alert and if the defendants (applicant) were really keen on arbitration, they should have at least replied stating so. That has not been done. About the readiness and willingness I may usefully refer to the decision in *Food Corporation of India* v. *M/s. Thakur Shipping Co*[2]., wherein it was laid down as follows :

> "An applicant for stay of legal proceedings under this section must satisfy the Court not only that he is but also was at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration. Thus the readiness and willingness must exist not only when an application for stay is made but also at the commencement of the legal proceedings."

5. In the case on hand, long after the suit had been filed, certain letters were written, as late as 28th June, 1975, both to the Secretary, Indian Chamber of Commerce, Ahmedabad and the Indian Chamber of Commerce, Calcutta, requesting a reference to arbitration relating to the suit, contracts. Certainly, this is not 'readiness and willingness' as contemplated under section 34 of the Act or as laid down in the above two decisions. Therefore these two letters are not of any assistants to the applicant by reason of which it would be open to him to contend that he was ready and willing for arbitration.

6. I may now turn to the conduct of the parties. Here is a defendant who had enough time to file the written statement after he was served with the said summons on 16th August, 1974. He did not do so and the time granted under the Original Side Rules had expired and therefore, the matter was posted in the undefended board on 9th October, 1974. In such a case, assuming that he entered appearance and prayed for time only to file this application, could it be said that there was no *bona fides* on his part or was he only attempting to circumvent the statutory provision under section 34 and take a chance later on. My answer is, more the latter. In such a case, as laid down in *Shroff Brothers* v. *Bisheswar Dayal Meatle*[1], the discretion should not be exercised, to quote the words of the learned Judge :

> "It is true that the section provides that application for stay under section 34 can be made "at any time before filing of written statement." That in my view fixes the time into the last date fixed for filing of the written statement under the provisions of the rules of the Original Side which I have mentioned before. Otherwise the petitioner would simply wait till the date of expiry and without making any application for extension of time to file the written

1. A.I.R. 1960 Bom. 292.
2. A.I.R. 1975 S.C. 469.

1. A.I.R. 1974 Cal. 352 at 356.

statement formally, get extension, if it is permitted, to make an application under section 34 of the Arbitration Act, 1940, beyond that, as if the time has not expired or it has been by necessary implication extended by Court. That, in my view, would be extending the meaning of the words "at any time before filing of written statement" in section 34 of the Arbitration Act, 1940. In my view, what is required under the section is that the application for stay must be made promptly and before the last date fixed for filing of the written statement under the provisions of the Civil Procedure Code or the rules of this Court."

7. In the result, this application will stand dismissed with costs.

8. Time to file the written statement six weeks from today.

R.S. —— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*N. S. Ramaswami, J.*

V. Nataraja Iyer and others .. *Appellants**

v.

Arunachalam and others .. *Respondents.*

and

Kumaraswami and others .. *Appellants**

v.

Guruswami Iyer and others .. *Respondents.*

Tamil Nadu Court-fees and Suits Valuation Act (XIV of 1955), section 40—Joint family property—Alienation by manager—Powers of manager—Suit for partition—Alienation questioned as not binding —No prayer for setting aside necessary—Court-fee need not be paid under section 40.

The joint family manager has authority to deal with the entire joint family properties and, for necessity and binding purposes he can validly alienate joint family properties. If in such cases a junior member of the coparcenary claims a division of the properties contending the alienations are not binding on him, he is not bound to ask for the setting aside of the alienations made by the joint family manager. [*Para.* 7.]

Where the alienations questioned are by a joint family manager, the plaintiff who questions the alienations need not pray for setting aside the alienations and the question of paying Court-fees under section 40 of the Madras Court-fees and Suits Valuation Act does not arise. In a case where the joint family manager alienates the family properties, even though the minor coparceners are also mentioned as parties to the document, that would not lead to the conclusion that when the minor coparceners question the alienation, they would be obliged to pray for setting aside the alienation. [*Para.* 8.]

Cases referred to:

Kandaswami Udayan v. *Annamalai Pillai*, (1948) 2 M.L.J. 130: 61 L.W. 637: A.I.R. 1949 Mad. 105; *Ramaswami Aiyangar* v. *Rangachariar*, (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259: 51 L.W. 11: A.I.R. 1940 Mad. 113 (F.B.); *Sankaranarayana* v. *Kandaswami*, I.L.R. (1956) Mad. 1300: (1956) 2 M.L.J. 411 : 69 L.W. 686: A.I.R. 1956 Mad. 670 (F.B.).

Appeals against the decree of the Court of the Principal Subordinate Judge, Vellore dated 15th April, 1969 in Original Suit No. 108 of 1963.

D.K. Srinivasagopalan, for Appellant in A.S. No. 498 of 1969.

S. Thiagaraja Ayyar and *N. Vanchinathan*, for Respondent in A.S. No. 498 of 1969 and Appellants in A.S. No. 536 of 1970.

R. Shanmugham, K. Ramachandran, K.M. Natarajan, V. Sridevan, G. Masilamani, R. Balachandar, Raj and *Raj, B. Soundarapandian, R. Balasubramanaiam, K. Venkatasubbaraju* and *S.V. Jayaraman*, for Respondents in A.S. No. 536 of 1970.

The Court delivered the following

JUDGMENT:—These two appeals arise out of a suit for partition and separate posses-

* Appeal Nos. 498 of 1969 and 536 of 1970. *28th January*, 1976

sion, attacking the alienations made by the father of the plaintiffs. The five plaintiffs are the sons of Guruswami Iyer, the first defendant in the suit. Vembu Iyer, the second defendant, and Ayyasami Iyer, the third defendant, are the elder brothers of the first defendant and they are some of the alienees of the properties belonging to the family of the first defendant. It is common case that there had been an oral partition amongst the three brothers, namely the defendants 1 to 3, in 1943. It is also not in dispute that the first defendant and his five sons (the plaintiffs) constituted a Hindu joint family. It owned certain agricultural lands in Mayuram Taluk, Thanjavur District, to be specific in two villages, namely Melanallur and Arumozhi Devan villages. It also owned two house properties and some lands in Tiruvannamalai. The properties situate in Tiruvannamalai are described as items 1 to 6 in the A schedule to the plaint while the lands in Mayuram taluk are described in the B schedule as items 1 to 37 thereof.

2. The first defendant started alienating the properties from 1945 onwards. The first of the alienations was under Exhibit B-1 dated 20th March, 1945. Under this document, the first defendant sold items 25 to 27 of the plaint B schedule to the second defendant for a sum of Rs. 1,700. Later there had been several alienations by the first defendant and all the alienees as well as the subsequent alienees have been made parties to the suit.

3. The plaintiffs claimed a 5/6th share in all the suit properties and according to them none of the alienations was binding on them. Some of the alienees contested the suit and some did not.

4. The Court below held that all the suit properties are joint family properties and that all the alienations are fully supported by consideration; but the Court further held that certain alienations were not for binding purposes and that therefore the plaintiffs are entitled to their 5/6th share in the properties covered by those alienations. In respect of certain other alienations, the Court accepted the case of the alienees that the alienations were for binding purposes and dismissed the suit regarding the same. The suit had been filed *in forma pauperis* and the Court below has directed the plaintiffs to pay half the Court-fee due on the plaint, the other half to be paid by the alienees who did not succeed in proving the binding nature of the alienations.

5. A.S. No. 498 of 1969 is filed by defendants 25 to 28 who are the legal representatives of the second defendant (he having died during the pendency of the suit) challenging the decision of the Court below that the alienation under Exhibit B-1 conveying items 25 to 27 of plaint B Schedule is not binding on the plaintiffs. A.S. No. 536 of 1970 is filed by the plaintiffs against the dismissal of the suit in respect of four alienations, namely the one under Exhibit B-20, dated 5th January, 1954 conveying item No. 1 of plaint A schedule to the 10th defendant, that under Exhibit B-23 dated 10th July, 1953 conveying item No. 2 of plaint A schedule to the 9th defendant, that under Exhibit B-24 dated 21st January, 1947 conveying items 1 to 24 of plaint B schedule to the 4th defendant and the last under Exhibit B-16 dated 26th June, 1957 conveying items 29 and 30 of plaint B schedule to the 12th defendant.

6. One of the points raised by the plaintiffs who are the appellants in A.S. No. 536 of 1970 is that the Court below has wrongly directed the plaintiffs to value the claim under section 40 of the Madras Court-fees and Suits Valuation Act, 1955. Originally the plaintiffs valued the suit under section 37 (1) and the Court-fee payable was shown as Rs. 866.75. But the Court held that the plaintiffs were obliged to seek to set aside the several alienations and therefore section 40 of the Madras Court-fees and Suits Valuation Act is attracted and that Court-fee should be paid on the value of the properties as contemplated under section 40. Then the plaint was amended showing the value of the properties as found in the various sale-deeds, but later, on a check-slip issued by the Court-fee Examiner, the plaint came to be further amended showing the value of the properties as on the date of suit and the Court-fee payable has swelled to Rs. 4,500 odd.

7. Mr. S. Thiagaraja Iyer, learned counsel for the plaintiffs-appellants con-

tends that the view taken by the Court below that section 40 of the Court-fees and Suits Valuation Act is applicable to this case is not correct. I am of the view that the contention has to be upheld. It must be remembered that this is a case where the alienations were of joint family properties by the father-manager of the joint family. One is not concerned in this case about alienation of minors' properties by their guardian acting on their behalf. Needless to point out that the joint family manager has authority to deal with the entire joint family properties and, for necessity and binding purposes, he can validly alienate joint family properties. If in such cases, a junior member of the coparcenary claims a division of the properties contending that the alienations are not binding on him, he is not bound to ask for the setting aside of the alienations made by the joint family manager.

8. This position has been made clear in *Kandaswami Udayan* v. *Annamalai Pillai*[1], which followed the full Bench decision in *Ramaswami Aiyangar* v. *Rangachariar*[1] Subba Rao, J., as he then was, held in *Kandaswami Udayan* v. *Annamalai Pillai*[2], that where the plaintiffs instituted the suit for partition of the family properties alleging that the properties were the ancestral properties of the plaintiff and their father and that the father alienated the properties, which alienations were not binding on the plaintiff, they are only seeking to recover possession ignoring the alienations and that therefore it was in substance a suit for mere possession falling under section 7 (*v*) of the then Court-fees Act and the plaint was not leviable to Court-fee under section 7 (*vi-A*) of the said Act as amended in Madras. Section 7 (*iv-A*) of the earlier Act corresponds to section 40 of the present Act while section 7 (*v*) corresponds to section 37 (1) of the present Act. As I said, this decision follows the Full Bench decision in *Ramaswami Aiyangar* v. *Rangachariar*[2]. These are clear authorities for the proposition that where the alienations questioned are by a joint family manager, the plaintiffs who question the alienations need not pray for setting aside the alienations and the question of paying Court-fees under section 40 of the Madras Court-fees and Suits Valuation Act does not arise. Only in a case where property belonging to a minor is alienated by his guardian, the minor becomes *eo nominee* a party to the document and hence he is obliged to ask for setting aside the alienation. In a case where the joint family manager alienates the family properties, even though the minor coparceners are also mentioned as parties to the document, that would not lead to the conclusion that when the minor coparceners question the alienation, they would be obliged to pray for setting aside the alienation.

9. In *Sankaranarayana* v. *Kandasami*[1], one of the questions referred to the Full Bench was:

> "Is the position of a sale-deed executed by a father of the minor, as guardian of the minor son and not as manager of the joint family and head of the coparcenary, in any way different from the position of a sale-deed executed by the mother as guardian of the minor?"

At page 676, column 2, Govinda Menon, J., speaking for the Full Bench observed:

> "The cases cited at the Bar can be classified under two heads, namely those in which the minor's properties are being dealt with by a guardian and the minor seeks a decision that such dealings are not binding on him and secondly, those in which the father or the manager of the joint family purporting to deal with the family properties acts as the guardian of the minor, who is only one of the members of the joint family.
>
> It seems to us that in the former cases the minor is *eo nominee* a party to the transaction and he should seek to cancel the document in which case court-fee has to be paid under section 7 (*iv-A*) of the Act. But where the minor was only a member of a joint family and the transaction is on behalf of the joint family, he could always ignore the transaction as not binding on the family and seek to recover possession."

1. (1948) 2 M.L.J. 130 : 61 L.W. 637 : A.I.R. 1949 Mad. 105.
2. I.L.R. (1940) Mad. 259 : 51 L.W. 11 : (1940) 1 M.L.J. 32 : A.I.R. 1940 Mad. 113 (F.B.)

1. I.L.R. (1956) Mad. 1300 : (1956) 2 M.L.J. 411 ; 69 L.W. 686 : A.I.R. 1956 Mad. 670 (F.B.)

10. Therefore, the Court below is not right in holding that the prayer in the plaint has to be valued under section 40 of the Court-fees and Suits Valuation Act. That part of the decision of the Court below is reversed and I hold that the Court-fee payable on the plaint is only Rs. 866-75 as originally shown by the plaintiffs.

11. Regarding the alienations, I will first take up the alienation of items 25 to 27 of plaint B Schedule under Exhibit B-1. As I said that is the first of the alienations and it is in favour of the second defendant who is one of the elder brothers of the first defendant. It was at a time when all the properties were available. The document recites cash consideration of Rs. 1,700. No purpose for the first defendant receiving cash and parting with the property is mentioned in the document. It is now common ground that the family of the first defendant and the plaintiffs had a money lending business apart from a hotel business at Tiruvannamalai. At the time of this sale the family was small, only the first plaintiff having been born by then. The case put forward by the second defendant and then his legal representatives who are now the appellants in A.S. No. 498 of 1969 is that the sum of Rs. 1,700 was received by the first defendant under Exhibit B-1; for discharging debts incurred in connection with the funeral of the the mother of defendants 1 to 3. This part of the case has been rightly disbelieved by the Court below. It may be true that mother of defendants 1 to 3 had died sometime prior to the execution of Exhibit B-1, but surely, there is no question of the three brothers amongst themselves spending Rs. 5,000 to Rs. 6,000 towards funeral expenses. Anyway when it is admitted that the family had a money lending business apart from other properties, there is nothing to show that the first defendant had been obliged to borrow for the funeral expenses and that necessitated the sale of the said items to the second defendant under Exhibit B-1, especially when there was no other commitment. The conclusion of the Court below that the said sale is not binding on the other coparceners is right.

12. However, the Court below is not right in granting a decree in favour of the plaintiffs in respect of those items for a 5/6th share. It is common ground that plaintiffs 2 to 5 were not born when Exhibit B-1 came to be executed. There was controversy in the Court below, whether the first plaintiff himself was born on that date. The second defendant had contended that the first plaintiff was also born only subsequent to 20th March, 1945, the date of Exhibit B-1. But there is sufficient evidence to show that the first plaintiff was in existence when exhibit B-1 came to be executed. In Exhibit B-24 which is a sale deed in favour of the fourth defendant, the plaintiff is shown as a minor aged 3 years and that document is dated 21st January, 1947. That means the first plaintiff ought to have been born even prior to 20th March, 1945. Therefore the conclusion of the Court below that the first plaintiff was born even prior to the execution of Exhibit B-1 is correct. In fact, in the grounds of appeal in A.S. No. 498 of 1969, no ground has been taken attacking the finding of the lower Court on this question, namely, whether the first plaintiff was born even prior to Exhibit B-1. On the contrary, the grounds of appeal themselves proceed on the basis that the first plaintiff was born prior to Exhibit B-1 and that only plaintiffs 2 to 5 were not in existence on the date of Exhibit B-1.

13. That means, on that date, the coparcenary consisted of only the first defendant and the first plaintiff. The first defendant can validly alienate a half share as on that date, for, if there had been a division between him and the first plaintiff on that date, the first defendant would be entitled to a half share. Therefore, the Court below ought to have granted a decree in respect of items 25 to 27 of plaint B Schedule only for one half and not for 5/6th.

14. Another error committed by the Court below as far as the legal representatives of the second defendant are concerned is about the payment of Court-fee. It has generally directed all the alienees whose alienations have been held to be not binding on the plaintiffs, to pay half of the total Court-fee payable on the plaint. That is not right. Each alienee is interested only in the property or properties

purchased by him. Therefore, the proper direction should be that the appellants in A.S.No. 498 of 1969, namely the legal representatives of the second defendant who are now in possession of items 25 to 27 of plaint B Schedule shall pay half the proportionate Court-fee payable in respect of those items. A.S.No. 498 of 1969 has therefore to be partly allowed as indicated above.

15. Coming to A.S. No. 536 of 1970, the appeal filed by the plaintiffs, one is concerned with four alienations. I shall first take up the alienation under Exhibit B-20 dated 5th January, 1954 in favour of the 10th defendant. Under that document, item No. 1 of plaint A Schedule which is a house property in Thiruvannamalai town had been sold to the 10th defendant for a sum of Rs. 2,500. The consideration for this sale is the discharge of two earlier mortgages, each for Rs. 1,000 and discharge of a promissory note debt to the extent of Rs. 500, the promissee being the 10th defendant himself. Exhibits B-21 and B-22, both of the year 1953, one in favour of the 10th defendant himself and the other in favour of a third party are the two earlier mortgages. Nothing is shown before me that the said two mortgages were not for binding purposes. Therefore under the sale deed, Exhibit B-20, a major part of the consideration, namely Rs. 2,000 had gone in discharge of antecedent binding debts of the family. The contention of Mr. Tyagaraja Iyer, learned counsel for the plaintiffs-appellants, is that there is no acceptable evidence that there was a promissory note debt to the extent of Rs. 500 and that the same came to be discharged by the sale of this property. It is pointed out that if the 10th defendant's case that the promissory note debt is true, then he would be in a position to produce the discharged promissory note. The 10th defendant as D.W. 7 has sworn to the fact that on the execution of the sale-deed under Exhibit B-20 in his favour, he handed over the promissory note for Rs. 500 with an endorsement of discharge to the first defendant. Under the circumstances of the case, there is no reason why this part of the evidence of the 10th defendant should not be accepted. It must be remembered that the promissory note debt was not due to a third party. It was due to the 10th defendant, the alienee himself. Therefore when the debtor sells his property and out of the consideration, the promissory note debt is discharged, it stands to reason that the first defendant insisted upon getting back the promissory note with the endorsement of discharge and accordingly the 10th defendant parted with the promissory note.

16. Even though in the Court below it seems to have been contended that the property had not been sold for a proper price, such a contention is not raised before me as far as this alienation is concerned. I uphold that decision of the Court below regarding the sale in favour of the 10th defendant under Exhibit B-20.

17. Exhibit B-23 dated 10th July, 1953 is a sale in favour of the 9th defendant under which item No. 2 of plaint A Schedule had been sold for a sum of Rs. 800. That is also a house property in Tiruvannamalai. It may be noted that by the time this document came to be executed, the first defendant had been obliged to alienate several other properties to third parties, for some reason or other. The recitals in this document go to show that the first defendant received a cash consideration of Rs. 800 in order to meet the family expenses. That is what is spoken to by the 9th defendant as D.W. 10. The Court below has analysed the evidence carefully and has come to the conclusion that the said sale for a sum of Rs. 800 was for necessity and binding purposes. In view of the fact that the document itself recites that the sale was for meeting the family expenses, I think the evidence of the 9th defendant as D.W. 10 in this regard can be accepted. The validity of this alienation also is upheld.

18. Mr. Tyagaraja Iyer, seriously attacked the alienation under Exhibit B-24, dated 21st January, 1947 under which items 1 to 24 of B Schedule (some of the lands in Mayuram taluk) had been sold to the fourth defendant. The sale consideration is Rs. 10,000. The extent of the land conveyed is 12 acres 94½ cents and it is classified wet. The contention is that considering the extent of the property which is nearly 13 acres, the con-

sideration of Rs. 10,000 in grossly inadequate. But the learned counsel is not right in this respect, for, when the suit was filed in the year 1962, the value of these items has been shown only as Rs. 20,000. It is common knowledge that between 1947 and 1962, the price of immovable properties including agricultural lands had sharply risen. If the said items were worth Rs. 20,000 in 1962, it is quite probable that the real value of the same in 1947 was Rs. 10,000.

19. Out of the total consideration of Rs. 10,000, Rs. 1,000 had been received by the first defendant at the time of the agreement for sale and another sum of Rs. 5,000 on the date of sale. The balance, namely Rs. 4,000 was allowed to be with the vendee and the document recites that the same may be paid over after the plaintiffs 1 and 2 (who were then born) attained majority. There is also another clause in the same document which says that the amount has to be paid by the vendee even earlier and that to the first defendant himself if he offers sufficient security for the said amount. The alienee had executed a promissory note for the said amount. On the promissory note, a suit was laid and it was ultimately compromised under which the sum of Rs. 4,000 was paid to the first defendant on taking immovable property security.

20. The document recites that the first defendant sold the said item for investing the monies in his money-lending business. The question for consideration is whether the said sale could be supported on the ground of benefit to the family. As it is not the case of the alienee that the sale was not in order to discharge any antecedent debts or to meet any other family expenditure, the alienation cannot be supported on the ground of necessity. It can possibly be supported only on the ground of benefit to the family. It must be remembered that the lands sold under Exhibit B-24 are situated in Mayuram taluk in Thanjavur district while the family was living in Tiruvannamalai about 150 miles away. Evidently, the lands were in possession of tenants and it is not unlikely that the first defendant was not able to get proper income from these properties. As I pointed out already, it is common ground that the family had a money-lending business. It was also running a hotel at Tiruvannamalai. Under the above circumstances, if the first defendant thought that it would be in the interest of the family, if he converted the agricultural lands situate in Mayuram taluk into cash and put the same in the family business, it cannot be said that he acted imprudently.

21. The properties purchased by the fourth defendant have passed on to defendants 5 to 8 by subsequent alienations. Incidentally it may be noted that the recitals of consideration in those sale-deeds also go to show that under Exhibit B-24 the first defendant got the proper price for items 1 to 24 of plaint B Schedule. The conclusion of the Court below is therefore right regarding this alienation also.

22. The only other alienation with which I am concerned in this appeal is under Exhibit B-16 dated 26th June, 1957. Under that document, items 29 and 30 of B Schedule whose total extent is 1 acre 65 cents, had been sold to the 12th defendant for a sum of Rs. 2,227.50. The document itself recites payment of cash consideration. In this case it was not contended that the price was inadequate. However, the contention of Mr. Tyagaraja Iyer is that from the very recitals in the document it is evident that there was neither necessity nor benefit and therefore the alienation should not have been upheld by the Court below. The document simply says that the sum of Rs. 2,227.50 had been received by the vendor, namely the first defendant, in cash. The 12th defendant has given evidence as D.W. 2 and the attestors to the document have given evidence as D.Ws. 5 and 6. The evidence of these witnesses is that the first defendant had been obliged to sell the said two items because of pressing debts. It should be remembered that by this time the family had grown and many of the family properties had been lost. It is their evidence that in order to discharge the several debts due by the family, the document came to be executed. D. Ws. 5 and 6 are independent witnesses by all standing. Their evidence makes it clear that the first defendant represented that he had pressing family debts which he

had to discharge and the sale was for that purpose. The question is whether this evidence is to be accepted or not. The Court below which had the opportunity to see the witnesses in the witness box, after carefully assessing their evidence has accepted the same to be true. I do not find any reason to differ from the view taken by the Court below. It is true that the purpose for which the same came to be executed is not stated in the document itself. But that circumstance is not conclusive and the evidence of the independent witnesses cannot be rejected on that score. Therefore the said alienation has also to be upheld.

23. The result is, A.S.No. 498 of 1969 is partly allowed, in that the plaintiffs are entitled only to a half share in items 25 to 27 of plaint B Schedule and that the appellants (defendants 25 to 28) have to pay only half of the proportionate Court-fee payable in respect of those items. A.S. No. 536 of 1970 is also partly allowed. That is only in respect of the question of Court-fee payable on the plaint as indicated earlier.

24. The question of Court-fee has been taken as a specific ground in this appeal and part of the subject-matter of the appeal is the difference between the real Court-fee payable on the plaint and the Court-fee payable as determined by the Court below. On this part of the subject-matter of the appeal, the Court-fee payable is Rs. 273.50, whereas in respect of the main part of the appeal, the Court-fee payable is Rs. 666.50. As the plaintiffs-appellants succeed regarding the question of Court-fee, the sum of Rs. 273.50 is not to be recovered from the plaintiffs. Nor is it recoverable from any of the defendants, for the excess Court-fee came to be determined by the Court below, not on objections raised by any of the defendants. The Court-fee of Rs. 666.50 on the appeal Memo. in A.S. No. 536 of 1970 shall be paid by the appellants therein.

25. The parties are to bear their respective costs in both the appeals.

S.J. — *A.S.No. 498 of 1969 partly allowed; A.S.No.536 of 1970 partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*A. Varadarajan, J.*

A. Shukur .. *Appellant**

v.

K. E. Sundara Mudaliar and another .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)—Notification of estate under the Act—Entire estate vests in Government from notified date—Grant of patta by concerned Authority—Civil Court has no jurisdiction to interfere—Vesting in Government causes no discontinuity of adverse possession.

The plaintiff-appellant sued for a declaration of his title to and recovery of possession of the suit properties as heir to one *T*, the original owner, who had died in 1930. The lands were zamin lands. After the zamin had been notified and taken over by the Government under Act XXVI of 1948, the plaintiff was granted a patta in respect of the suit lands by the concerned Authorities under the Act. The plaintiff alleged that he had leased the properties in 1958 to the first respondent for casuarina cultivation and that the respondent had not given him his share of the crop. It was found on the evidence that the suit properties had subsequent to *T*'s death, been sold in execution of a decree against him in a small cause suit of 1933 in the Poonamallee Munsif's Court and purchased by one *P* who reconveyed the properties to the plaintiff's wife and her brother *A*, that *A* sold his half share therein to the first respondent, and thereupon the plaintiff's wife brought a suit in the Sub-Court, Chingleput, questioning the validity of the sale, that the suit ended in a compromise and a decree in terms thereof was passed on 12th August, 1949 under which the present suit items were allotted to the first respondent who, since then, was in exclusive possession and enjoyment of the same, perfecting a title by adverse possession against the plaintiff. In these circumstances,

*S.A. No. 697 of 1973. 23rd February, 1976

Held, Patta having been granted to the plaintiff-appellant under the provisions of Act XXVI of 1948 for the suit lands and other properties, it is not open to the civil Court to examine whether the appellant had no title to the suit lands and was not entitled to the grant of ryotwari patta. Though the title of the appellant and his wife to the properties had been lost by reason of the Court sale held in execution of the decree obtained in the small cause suit, the title to such properties had vested subsequently in the Government under the provisions of section 3 of Act XXVI of 1948 and the appellant had acquired title to the same by the grant of patta under the provisions of the Act by the Authorities. [*Paras.* 16 & 19.]

But the first respondent's possession of the suit lands from the date of the compromise decree of 1949 had been adverse. The mere vesting of the estate in the Government effected no discontinuity in the possession of the first respondent and he must be held to have perfected his title by prescription against the plaintiff-appellant. [*Para.* 20.]

Cases referred to :—

The State of Madras v. *Chockalingam Chettiar*, (1962) 2 M.L.J. 231; *Marimuthu Pillai* v. *Krishna Joshi*, (1958) 1 M.L.J. 273 : 71 L.W. 197 : I.L.R. (1958) Mad. 564 : A.I.R. 1958 Mad. 441; *Lakshmipathy Nayakar* v. *State of Madras*, (1959) 2 M.L.J. 254 : I.L.R. (1959) Mad. 915: 72 L.W. 505 : A.I.R. 1960 Mad. 15; *Soosai Udayar* v. *Andiappan Ambalam*, (1958) 71 L.W. 857 : (1959) 1 M.L.J. 195; *Secretary of State for India* v. *Mask and Company*, I.L.R. (1940) Mad. 599 : (1940) 2 M.L.J. 140 : 67 I.A. 222; 52 L.W. 1 : A.I.R. 1940 P.C. 105; *Chingurupatti Venkatasubba* v. *Ravi Ponnia*, (1957) 2 An.W.R. 204 : (1957) An.L.T. 670; *Appanna* v. *Sri Ramamurthi*, (1958) 1 An.W.R. 420; *Ramayya* v. *Brahmayya*, A.I.R. 1958 A.P. 100; *Sanjeevi Naicker* v. *Shanmugha Udayar*, (1965) 2 M.L.J. 204; *Krishnaswami Thevar* v. *Perumal Konar*, (1961) 1 M.L.J. 168; *Arumugham Chettiar* v. *Subramaniam Chettiar*, (1970) 83 L.W. 580; *Ratnasabhapathy Servai* v. *Sannasi Ambalagaram*, (1966) 1 M.L.J. 190.

Appeal against the decree of the Subordinate Court, Chingleput in Appeal Suit No. 36 of 1972, preferred against the decree of the Court of the District Munsif of Kancheepuram in Original Suit No. 782 of 1967.

S. K. Ahmed Meeran and *A. Abdul Hadi*, for Appellant.

P. B. Ananthachari and *T. N. Vallinayagam*, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff, who failed in both the Courts below, is the appellant. He filed the suit for declaration of his title to the suit properties and recovery of possession thereof and a half share of the casuarina crop raised by the respondents on the suit properties alleged to have been leased to the 1st respondent or its value of Rs. 3,000.

2. The suit properties are 3 items of lands, *viz.*, 1 acre 71 cents comprised in S. No. 97/1 said to correspond to Paimash No. 248/D forming item 1; 5 acres 50 cents of land comprised in S. No. 88/2 said to correspond to Paimash Nos. 221 and 265 forming item 2; and specific 13 acres 79 cents out of 44 acres 12 cents comprised in Paimash Nos. 233, 250/A, 250/B, 251, 252/B, 253, 255/B, 257/A, 257/B, 257/C and 264 of Karungali Village, Ponneri Taluk, Chingleput District, which was originally a zamin estate and taken over by the Government on 3rd January, 1951 under the provisions of the Madras Estates (Abolition and Conversion into Ryotwari) Act XXVI of 1948.

3. The appellant is the son of one Tippu Saheb who died in or about November, 1930, and he claimed to have inherited the suit properties as the heir of his father and to have obtained patta No. 17 in respect of the lands under the provisions of Act XXVI of 1948. He alleged that he had leased out the lands to the first respondent in 1958 for raising casuarina on half waram basis and that the first respondent refused to give him his share of the crops in 1965 and took away the entire casuarina crop estimated at 150 tons. He impleaded the second respondent, the widow of the first respondent's brother Vaidya-

lingam on the ground that she also put forward a claim to the suit properties.

4. The suit properties and other properties admittedly belonged originally to Tippu Saheb. Those properties appear to have been brought to sale subsequent to the death of Tippu Saheb in execution of a decree obtained against him in Small Cause Suit No. 19 of 1933 on the file of the District Munsif's Court, Poonamallee, and sold to one Parthasarathi Mudaliar. The appellant's wife Ghouse Bi and her brother Abdul Razack appear to have obtained reconveyance of the properties from the Court auction-purchaser Parthasarathi Mudaliar. Subsequently the first respondent obtained a sale in respect of a half share in those properties from Abdul Razack under Exhibit B-6 dated 18th November, 1944. Thereafter the appellant's wife Ghouse Bi filed O.S. No. 103 of 1947 in the Sub-Court, Chingleput, for a declaration that the sale of the half share of the properties by Abdul Razack (the third defendant in that suit) to the first respondent (the first defendant in that suit) was not valid and binding on her and that the first respondent was not entitled to be in joint possession of the properties with her on the basis of that sale and also for recovery of Rs. 3,500 being the value of the casuarina alleged to have been cut and removed by the first respondent and Parthasarathi Mudaliar. Exhibit A-10 is the copy of the plaint in that suit. The parties in that suit entered into a compromise (Exhibit B-1) and the compromise decree (Exhibit B-2) dated 12th August, 1949 had been passed in terms thereof, allotting certain properties to the first respondent. The properties had been described in the plaint, Exhibit A-10, by survey numbers though the zamin estate had been taken over under the provisions of Act XXVI of 1948 only on 3rd January, 1951 and survey and settlement operations in respect of the estate could have commenced only thereafter. But, in the compromise petition and decree, Exhibits B-1 and B-2, the properties have been described only by paimash numbers.

5. The defence in the present suit was that the first respondent got the present suit properties in the compromise decree and has been in exclusive possession and enjoyment of the properties since the date of the compromise decree and had perfected his title by adverse possession. The respondents denied the lease set up by the appellant and contended that the patta for the suit properties granted to the appellant by the Settlement Officer would not confer any rights on the appellant and will not affect the first respondent's right to the suit properties. They denied that the appellant was entitled to any share in the casuarina crop and contended that in any event the quantum of mesne profits claimed was excessive.

6. On a consideration of the evidence placed before him the learned District Munsif found that the survey numbers given in the plaint, Exhibit A-10, in O.S. No. 103 of 1947 was a mistake for paimash numbers and held that the properties allotted to the share of the first respondent in the compromise decree, Exhibit B-2, are the present suit properties, having regard to the boundary description. He held that the civil Court has no jurisdiction to go into the question of the validity or otherwise of the grant of patta by the Settlement Officer, but has jurisdiction to adjudicate upon competing claims to title to the property and for possession of the land for which patta had been granted by the Settlement Officer and that the first respondent has title to the suit property. He disbelieved the case of the appellant that the first respondent was in possession of the suit properties as his lessee and found that the first respondent had taken possession of the lands allotted to him under Exhibit B-2 even prior to the date of the alleged lease in October, 1958, *viz.*, items 1 and 2 in 1949, and item 3 in 1953, and had acquired title even by prescription to items 1 and 2. On these findings he dismissed the suit with costs.

7. On appeal the learned Subordinate Judge found that the first respondent has acquired title by prescription even to item 3 and he agreed with the learned District Munsif in all other respects and dismissed the appeal with costs.

8. Now the learned counsel for the appellant submits that the suit lands are different from those allotted to the first

respondent under the compromise decree. Exhibit B-2, on the ground that boundaries, extents and paimash numbers do not tally, that on the abolition of the estate under the provisions of Act XXVI of 1948 the suit properties had vested in the Government under the provisions of section 3 of that Act and Patta No. 17 had been granted to the appellant in respect of the properties by the Settlement Officer before whom the first respondent had not made any claim for the grant of patta in his favour, and the appellant, therefore, has title to the suit properties and that on the vesting of the suit properties in the Government on 3rd January, 1951 the continuity of possession of the first respondent had been lost and he could not be held to have acquired title to the suit properties by prescription.

9. As already stated, the lands had been described by survey numbers in the plaint (Exhibit A-10) in O.S. No. 103 of 1947 which had been filed by the appellant's wife Ghouse Bi against the first respondent, Parthasarathi Mudaliar and Abdul Razack, who were defendants 1 to 3 respectively in that suit. The estate having been taken over by the Government under the provisions of Act XXVI of 1948 only on 3rd January, 1951, survey and settlement operations could have commenced only thereafter. Therefore, it is clear, as observed by the learned District Munsif, that paimash numbers have been wrongly mentioned as survey numbers in Exhibit A-10. This is made clear by the fact that in the compromise petition and decree, Exhibits B-1 and B-2, dated 12th August, 1949 only paimash numbers have been given.

10. The suit item 1 has been described as 1 acre 68 cents comprised in Paimash No. 92/1 in Exhibit B-2, while it is stated to be 1 acre 71 cents in Paimash No. 248/D said to correspond to S. No. 97/1 in the plaint. The suit item 2 has been described in Exhibit B-2 as 5 acres 22 cents comprised in Paimash No. 82/2, while in the plaint it is stated to be 5 acres 50 cents comprised in Paimash Nos. 221 and 265 said to correspond to S. No. 88/2. The suit item 3 is stated in Exhibit B-2 to be 13 acres 10 cents out of 39 acres 68 cents comprised in Paimash No. 90, while, as stated already, it is stated in the plaint to be 13 acres 79 cents out of 44 acres 12 cents comprised in Paimash Nos. 233, 250/A, 250/B, 251, 252/B, 253, 255/B, 257/A, 257/B, 257/C and 264. No doubt, there is some discrepancy in the extents and paimash numbers between the plaint and Exhibit B-2. But the learned District Munsif has considered the boundaries and extents with reference to the key list, Exhibit A-6, in paragraphs 7 and 8 of his judgment and found that the suit items 1, 2 and 3 correspond to item 2, and 3 respectively in Exhibit B-2. With regard to item 1 he has found that the northern boundary in the plaint is given as S. No. 96 belonging to the first respondent and in Exhibit B-2 as the first respondent's land, that the eastern boundary of item 1 is given in the plaint as S. No. 92 and in Exhibit B-2 as item 3 which, according to the key list Exhibit A-6, is S. No. 92, that the western boundary is given in the plaint as Buckingham Canal and backwater and in Exhibit B-2 as Buckingham Canal, and that the southern boundary is not given in Exhibit B-2, and he has observed that three out of the four boundaries in regard to item 1 tally. With regard to the suit item 2 the learned District Munsif has found that item 1 in Exhibit B-2 should be S. No. 88/2 corresponding to suit item 2, that the eastern boundary is given in the plaint as poramboke battai and in Exhibit B-2 as battai poramboke, that the southern boundary is given in the plaint as Chinthamani Eswarar Koil lands and battai and in Exhibit B-2 as poramboke battai and Chinthamani Eswarar Koil land and battai, that the northern boundary is given in the plaint as backwater and in Exhibit B-2 as Buckingham Canal and the first respondent's land and that the western boundary is given in the plaint as S. No. 89 belonging to the first respondent and backwater and in Exhibit B-2 as the first respondent's land, and he has observed that the boundaries of item 2 given in the plaint and Exhibit B-2 tally. With regard to the suit item 3 the learned District Munsif has found that the western boundary, according to the plaint, is parts of S. Nos. 97/1, 96 and 93 and in Exhibit B-2 as item 2 therein

corresponding to S. No. 97/1; that the southern boundary is given in the plaint as battai and in Exhibit B-2 as battai poramboke leading to Kuppam, that the northern boundary is given in the plaint as S. No. 96 belonging to the first respondent and a portion of S. No. 92 and in Exhibit B-2 as the first respondent's land bearing Paimash No. 91. (a mistake for S. No. 91) and that the eastern boundary is given in the plaint as S. No. 92 and in Exhibit B-2 as the balance of Paimash No. 90 (a mistake for 92) belonging to Ghouse Bi and he has observed that the boundaries of item 3 tally, consequently he held that the suit properties had been allotted to the first respondent in the compromise decree, Exhibit B-2.

11. The learned Subordinate Judge has considered this question in paragraph 9 of his judgment and has observed that he is convinced that the present suit properties had been allotted to the first respondent in the compromise decree, Exhibit B-2. The learned counsel for the appellant submitted that there are some variations in the extents and boundaries; but he admitted fairly that the discrepancies cannot be stated to be pronounced. The Courts below have found, on the basis of the boundaries and the key list, Exhibit A-6, that the suit properties had been allotted to the first respondent in the compromise decree, Exhibit B-2. This is a finding on a question of fact and it cannot be interfered with in this second appeal.

12. The learned counsel for the appellant submitted that the appellant's father Tippu Saheb was the inamdar and the suit lands were his pannai lands and contended that after the estate had been taken over by the Government on 3rd January, 1951 under the provisions of Act XXVI of 1948, Patta No. 17 has been granted to the appellant in respect of the suit lands and that it is not open to the respondent to contend that the appellant has no title to the same having regard to the provisions of that Act. Section 3 (*b*) of the Act vests in the Government free from all encumbrances with effect on and from the notified date and save as otherwise expressly provided in that Act the entire estate, including all communal lands, porambokes, other non-ryoti lands, etc. Section 3 (*c*) of the Act declares that all rights and interests created in or over the estate before the notified date by the principal or any other landholder, shall as against the Government cease and determine. Section 3 (*d*) provides for the Government taking possession of the estate forthwith after removing any obstruction that may be offered, as well as all accounts, registers, pattas, muchalikas, maps, plans and other documents relating to the estate which the Government may require for the administration thereof. No doubt the proviso lays down that the Government shall not dispossess any person of any land in the estate in respect of which they consider that he is *prima facie* entitled to a ryotwari patta, if such person is a ryot, pending the decision of the Settlement Officer as to whether he is actually entitled to such patta, and if such person is a landholder pending the decision of the Settlement Officer and the Tribunal on appeal, if any, to it as to whether he is actually entitled to such patta. 'Ryoti land' according to clause (16) under section 3 of the Madras Estates Land Act (I of 1908) means 'cultivable land in an estate other than private land but does not include beds and bunds of tanks, etc.' Therefore, as contended by the learned counsel for the appellant, pannai lands of the inamdar would fall within the category of 'other non-ryoti lands' mentioned in section 3 (*b*) of Act XXVI of 1948. Section 11 of Act XXVI of 1948 provides for every ryot in an estate with effect on and from the notified date being entitled to a ryotwari patta in respect of all ryoti land which, immediately before the notified date, would properly be included or ought to have been properly included in his holding, and are not either lanka lands or lands in respect of which a landholder or some other person is entitled to a ryotwari patta under any other provision of the Act; and also to all lanka lands in his occupation immediately before the notified date, such lands having been in his possession or in occupation of his predecessors-in-title continuously from the first of July, 1939. The proviso to section 11 lays down that no person who had been admitted into

possession of any land by a landholder on or after the first of July, 1945 shall, except where the Government may otherwise direct, be entitled to a ryotwari patta in respect of such land. Section 12 of Act XXVI of 1948 provides that in a case of zamindari estate the landholder shall, with effect on and from the notified date, be entitled to a ryotwari patta in respect of all lands, including lanka lands, which belonged to him as private land within the meaning of section 3, clause (10) (*a*) of the Estates Land Act........etc. Section 15 of Act XXVI of 1948 provides for the Settlement Officer examining the nature and history of all lands in respect of which the land-holder claims ryotwari patta under sections 12, 13 or 14, as the case may be, and deciding in respect of which lands the claim shall be allowed, and also provides for an appeal against his decision to the Tribunal. Section 56 of Act XXVI of 1948 has been omitted by the Amendment Act XXXVI of 1958. But section 64-C of Act XXVI of 1948 lays down that any order passed by the Government or other authority under the Act in respect of matters to be determined for the purposes of the Act shall, subject only to any appeal or revision provided by or under the Act be final, and declares that no such order shall be liable to be questioned in any Court of law.

13. The learned counsel for the appellant relied upon the decision of Anantanarayanan, J. as he then was in *The State of Madras* v. *Chockalingam Chettiar*[1], and submitted that the effect of the taking over of the estate is to vest in the Government free of all encumbrances the entire estate, including all communal lands, poramboke lands, other non-ryoti lands, etc., subject to such rights in the ryot or inamdar as are provided for in the Act. The learned Judge has observed in that decision.

"I have already referred to section 3 (*b*) and 3 (*c*), under which the entire estate in vested in the Government free of all encumbrances; and all rights and interests created before the notified date cease, and are terminated as against the Government. Under section 3 (*d*), the Government are entitled to take possession of the estate and connected records, but they are not to dispossess any person, if, *prima facie*, he is considered 'entitled to patta'. That the effect of section 3 is to vest the entire estate in the Government including ryoti lands, pannai lands, buildings and every other kind of interest except as specifically saved under the provisions of the Act, is a proposition beyond controversy or dispute. It is sufficient to refer here to the Bench decision in *Marimuthu Pillai* v. *Krishna Joshi*[1] and *Lakshmipathy Nayakar* v. *State of Madras*[2]."

The learned counsel for the respondents did not contend that this is not the effect of the notification of the estate under the provisions of Act XXVI of 1948. Therefore, I agree with the learned counsel for the appellant that with effect on and from the notified date, *viz.*, 3rd January, 1951, the entire estate had vested in the Government.

14. The learned counsel for the respondents relied upon some decisions, which will be referred to presently, and submitted that the respondents were not aware of the grant of patta to the appellant after the notification of the estate under the Act and that as the properties had been lost by the Court sale held in execution of the decree obtained against the appellant's father Tippu Saheb in the said Small Cause Suit No. 19 of 1933 on the file of the District Munsif's Court, Poonamallee, the grant of patta to the appellant is not valid and binding and that it has not resulted in the loss of the first respondent's title to the suit properties. The first decision relied upon by the learned counsel for the respondents is of Ramachandra Iyer, J., as he then was, in *Soosai Udayar* v. *Andiyappan Ambalam*[3], which arose out of certain suits which had been filed for recovery of possession. The plaintiffs in those suits contended that the kudiwaram rights

1. (1962) 2 M.L.J. 231.

1. (1958) 1 M.L.J. 273 : 71 L.W. 197 : I.L.R (1958) Mad. 564 : A.I.R. 1958 Mad. 441.
2. I.L.R. (1959) Mad. 915 : 72 L.W. 505 : (1959) 2 M.L.J. 254: A.I.R. 1960 Mad 15.
3. (1958) 71 L.W. 857 : (1959) 1 M.L.J. 195

in the lands vested in them; and the defendants therein, who were cultivating the lands under them, trespassed into the lands between January, 1948 and May, 1950. The defendants in those suits asserted title to and possession of the kudiwaram in themselves and contended that the villages in question had been notified under Act XXVI of 1948 and the Government had become the owner and that the civil Court had no jurisdiction to go into the question of title. The question whether the civil Court has jurisdiction to try the suits was decided as a preliminary issue and the trial Court held in favour of the defendants while the lower appellate Court held against them. Ramachandra Iyer, J., as he then was, observed in his judgment :

"The effect of these provisions is that all the rights of the landholder, ryots, inamdars and other persons interested in the erstwhile estate would cease on a notification being made under the Act and the entire estate would vest in the Government absolutely. The estate having thus vested in the Government it should normally be open to it to dispose of the lands as it pleased, but the statute itself regulated as to how it should be disposed of. As regards ryoti lands, private lands etc., in the village the tenure was changed from one under the family to ryotwari system under the Government, and ryotwari pattas are to be issued to the ryots in respect of their holdings and to the landholder in respect of the private lands. The right to obtain such patta is regulated by the provisions in the statute. Exclusion of the Civil Court's jurisdiction cannot by implication be held to by more than what is necessary for working out the rights created by the statute. If for instance the determination as to who was the lawful ryot of a holding becomes necessary for the grant of a patta under the Act, that would be within the exclusive jurisdiction of the Tribunals, under the Act. A person should not, for the purpose of obtaining a ryotwari patta be enabled to get a declaration of his title to kudiwaram, so as to force the Tribunals under the Act to grant the patta to him, as the duty of deciding that question is invested in the Tribunal. If, however, that determination becomes relevant for deciding any other issue between the parties in a civil suit, there can be no exclusion of jurisdiction of the civil Court."

In *Secretary of State for India* v. *Mask and Company*[1], the Privy Council stated it as settled law that the exclusion of the jurisdiction of the civil Court is not to be readily inferred but that such exclusion must be explicitly expressed or clearly implied. Generally speaking the question as to who was the lawful ryot of a holding cannot have any practical importance after the estate has been taken over except for the purpose of the grant of the ryotwari patta. That perhaps is the reason why the determination of the question is provided for by section 56. But if the relief claimed in a civil Court is not what is created or granted by the Act, *e.g.*, the right to obtain a patta, but a civil right the jurisdiction of the civil Court which always existed, cannot be held to be ousted as the statute does not either expressly or impliedly extinguish such rights. It may be that for the grant of such relief the question to be decided is as to who was the ryot of a holding. Such a determination would necessarily be incidental and cannot be deemed to be impliedly excluded by section 56. There is no provision in the Act to stay all suits which involve the determination of the question as to who was the lawful ryot of a holding or one to refer that issue to the statutory Tribunals for adjudication and to dispose of the suit on receipt of a finding from such Tribunals. I am not able to see anything on principle or in the terms of the Act to hold that the civil Court has been rendered powerless to decide a necessary issue between the parties though such an issue is one contemplated under section 56, for the purpose of deciding rights other than those created or provided for by the Act. In my opinion that view is supported by authority. In *Chingurupati Venkatasubba* v. *Ravi Ponnia*[2], there was a dispute as to the right to possession of certain

1. I.L.R. (1940) Mad. 599: (1940) 2 M.L.J. 140:76 I.A.222:52 L.W.1 :A.I.R.1940 P.C.105.
2. (1957) An.L.T.670: (1957) 2 An.W.R.204.

lands. One of the issues involved in the case was as to which of the parties was entitled to a patta from the landholder. Chandra Reddi, J. (as he then was), held that the civil Court could certainly take cognizance of suits in which title to the holding forming part of an estate is put in issue as relief of possession and mesne profits could not be granted by the Settlement Officer, they being beyond his competence and within the purview of civil Courts. This question was considered by a Bench of the Andhra High Court in *Appanna* v. *Sri Ramamurthi*[1]. In that case a dispute arose as to the arrears of rent of a holding and also as to who was the lawful ryot. Subba Rao, C.J. (as he then was) held that the reliefs prayed for came within the provisions of section 56 of the Madras Act XXVI of 1948 and that a suit was beyond the cognisance of the civil Court. In *Ramayya* v. *Brahmayya*[2], it was held that the right to obtain ryotwari patta can be enforced only before the special forum set up under the Act and that relief cannot directly or indirectly be sought elsewhere and that the Act does not prohibit the grant of reliefs in regard to other rights flowing from possession etc.

15. In the instant case the relief claimed is one of possession. Neither the Settlement Officer nor the Tribunal has any jurisdiction to grant such a relief. It may be that for the purpose of granting relief the question whether which of the parties had kudivaram rights may have to be incidentally decided but such incidental decision is only to give relief as to possession and cannot bind the Settlement Officer or the Tribunal when they have to decide that question under the Act. Ultimately the learned Judge held that the civil Court had jurisdiction to entertain the suits for possession.

16. In the present case it is seen from the chitta extract (Exhibit A-1) that patta No. 17 had been granted to the appellant for the suit lands and other properties, therefore it is not open to the civil Court directly or indirectly to go into that question and find out whether the appellant had no title to the suit lands and was not entitled to the grant of ryotwari patta.

17. The next decision relied only by the learned counsel for the respondents is that of Ramamurti, J. in *Sanjeevi Naicker* v. *Shanmuga Udayar*[1], where the learned Judge has observed:

> "The principles laid down in the decisions of this Court in *Soosai Udayar* v. *Andiyappan*[2] and *Krishnaswami Thevar* v. *Perumal Konar*[3], would clearly govern despite section 64-C. It is unnecessary to discuss those cases in detail as the principle enunciated in those decisions is clear, *i.e.*, only when the Revenue Authorities can grant a particular relief their decisions would become final to that limited extent. But if the Revenue Authorities cannot grant a particular relief, namely, relief of possession and declaration of title or relief of injunction, the orders passed or the decisions rendered by the authorities concerned under section 64-C of Madras Act XXVI of 1948 cannot operate as a bar to the civil Court entertaining the suit and adjudicating upon such disputed questions which are out of the purview of the authorities functioning under the Act."

The learned Judge himself has held that the authority constituted under Act XXVI of 1948 can grant a relief and his decision would become final to that limited extent. The ryotwari patta No. 17 for the suit lands had been granted to the appellant in the present case, as already stated. If Ramamurti, J., has held in that decision that merely because the relief of possession and damages also have been prayed for it is open to the civil Court to consider whether the plaintiff had no title to the suit lands and whether the grant of patta to the plaintiff by the authority constituted under Act XXVI of 1948 is not proper, with respect I am unable to agree, having regard to the

1. (1958) 1 An.W.R. 420.
2. A.I.R. 1958 Andh. Pra. 100.

1. (1965) 2 M.L.J. 204.
2. (1959) 1 M.L.J. 195 : (1958) 71 L.W. 857.
3. (1961) 1 M.L.J. 168.

fact that in *Ramayya* v. *Brahmayya*[1] and *Appanna* v. *Sri Ramamurthy*[2], referred to in the decision of Ramachandra Iyer, J. (as he then was), in *Soosai Udayar* v. *Andiyappan Ambalam*[3], it has been held that the right to obtain ryotwari patta can be enforced only before the special forum set up under the Act and that the relief cannot directly or indirectly be sought elsewhere, though the Act does not prohibit the grant of reliefs by the civil Courts in regard to other rights flowing from possession, etc.

18. The third decision relied upon by the learned counsel for the respondents is of Natesan, J. in *Arumugam Chettiar* v. *Subramaniam Chettiar*[4]. The land in dispute in that case was in an inam village which had been taken over by the Government under Act XXVI of 1948 on 1st October, 1951. The suit was for declartion of title and injunction or in the alternative for possession. The land was admittedly pannai land in an estate and patta had already been issued to the first defendant in that suit. The case of the plaintiff in that suit was that there was an exchange of lands between the plaintiff and his father on the one hand and the first defendant on the other on 23rd October, 1941 and that in the exchange the plaintiff obtained the suit lands from the first defendant and he was in continuous possession of the land since the land was dispossessed by the first defendant only in July, 1961. The plaintiff's application for grant of a patta under section 13 of XXVI of 1948 had been rejected by the Settlement Officer on the ground that patta had already been granted to the first defendant. Admittedly there were deeds of exchange between the plaintiff and his father on the one hand and the first defendant on the other. But they were unstamped and the first defendant contended that they were cancelled immediately after they were executed. The defence that the exchange was cancelled had been rejected by the Courts below and it was found that the plaintiff was in possession from 23rd October, 1941 until he was dispossessed in July, 1961. The contention urged before Natesan, J., was that the civil Court had no jurisdiction to entertain a claim of title to pannai lands. The learned Judge has observed:

> "There are two answers to this objection: (1) the suit is not for the grant of patta, a matter within the exclusive jurisdiction of the authorities under the Act, and (2) the plaintiff's acquisition of title as against the defendant 1 is by uninterrupted possession, prescription, completed no doubt subsequent to the taking over of the estate by the Government. Reliance is placed for barring the jurisdiction of the civil Court on section 64-C of the Act where it is provided that any order passed by the Government or other authority under the Act in respect of matters to be determined for the purposes of the Act shall, subject only to appeal or revision provided by or under the Act be final and that no such order shall be liable to be questioned in any Court of law. The first answer to this plea is, that the relevant sections do not provide for and are not intended to give an adjudication as to the owernship of pannai land between rival claimants."

Natesan, J., has extracted in his judgment the following observation made by Ramachandra Iyer, J. (as he then was), in *Krishnaswami Thevar* v. *Perumal Konar*[1]:

> "It may be noticed that under section 15 it is only the nature and character of the land that has got to be decided by the special machinery created by the Act. Patta would be given to the landholder if the land is of the category mentioned in sections 12 to 14. But if there are rival claims to the title of the landholder himself, there would be no power in the Settlement Officer or the Tribunal to adjudicate as to who among them would have a preferential right."

The learned Judge has observed that patta is only a bill. In ryotwari areas it may be so. It cannot be mere bill when the

1. A.I.R. 1958 Andh. Pra. 100.
2. (1958) 1 An.W.R. 420.
3. (1959) 1 M.L.J. 195 : 71 L.W. 857.
4. (1970) 83 L.W. 580.

1. (1961) 1 M.L.J. 168.

patta is issued for the first time by the authorities constituted under Act XXVI of 1948 after the estate had vested in the Government under the provisions of that Act. With respect, it is not possible to agree with the view of Natesan, J., that the civil Court has jurisdiction to go into the question of the correctness or otherwise of the grant of patta by the Settlement Officer in a civil suit, if in that suit reliefs which could not be granted by the authority constituted under the Act of XXVI of 1948 are also prayed for, having regard to the decision in *Ramayya* v. *Brahmayya*[1] and *Appanna* v. *Sri Ramamurthy*[2] referred to above. It is necessary, in this connection, to note the decision of Kailasam, J., in *Ratnasabhapathy Servai* v. *Sannasi Ambalagaran*[3]. In that case the patta had been granted to the zamindar and the defendants contended that the lands were ryoti lands which were in the possession of themselves and their predecessors and were not the pannai lands of the zamindar and that the grant of patta to the zamindar was without going to the merits and was invalid and not final and binding on them. The learned Judge has held that the decision of the Settlement Officer, which had not been appealed against, regarding the nature of the land in a notified estate by the grant of ryotwari patta is final and that the civil Court has no jurisdiction to go into that question.

19. Under the circumstances, though the title of the appellant and his wife to the properties had been lost by the Court-sale held in execution of the decree obtained in the Small Cause Suit No. 19 of 1933 on the file of the District Munsif's Court, Poonamallee, the title to the properties had subsequently vested in the Government under the provisions of section 3 of Act XXVI of 1948 and the appellant has acquired title to the properties by the grant of patta under the provision of that Act by the authorities constituted under that Act, and this cannot be questioned in the civil Court.

20. Though the estate had vested in the Government under the provisions of section 3 of the Act, the Government had no right to dispossess any person of any land in the estate in respect of which the Government considered that he is *prima-facie* entitled to a ryotwari patta having regard to the proviso to section 3 of that Act. The Court below has found that the first respondent has been in possession of the suit properties since the date of the compromise decree (Exhibit B-2) passed on 12th August, 1949. The appellant has admitted in paragraph 4 of the plaint that the suit properties were originally included in Patta Nos. 10-A and 10-B issued to Tippu Saheb and has stated that those pattas were granted to him after his death. The kachayat book (Exhibit B-3) produced by the respondent shows that the first respondent has paid kist for patta Nos. 10-A and 10-B for faslis 1360 to 1368 and for Patta No. 17 in faslis 1371, 1372 and 1375 and that the second respondent has paid kist for Patta No. 17 in faslis 1371 to 1373 and 1375. The respondent had thus paid kist for the suit lands right from 1950. Their case that the first respondent had been the appellant's lessee has been disbelieved by both the Courts below. The first respondent's possession of the suit lands from the date of the compromise decree (Exhibit B-2) has been adverse and it is not possible to accept the contention of the learned counsel for the appellant that the mere vesting of the estate had resulted in the discontinuity of possession of the first respondent, especially having regard to the proviso to section 3 under which the Government shall not dispossess any person of any land in the estate in respect of which they consider that he is *prima facie* entitled to a ryotwari patta. There is, therefore, no reason to interfere with the concurrent finding that the first respondent has acquired title by prescription in respect of items 1 and 2 and that of the lower appellate Court that he has acquired title by prescription even to item 3 of the suit properties.

21. The second appeal, therefore, fails and is dismissed with costs. No leave.

R.S. ——— *Appeal dismissed.*

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1. A.I.R. 1958 Andh. Pra. 100.
2. (1958) 1 An.W.R. 420.
3. (1966) 1 M.L.J. 190.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasdda Rao, J.*

Karmagam .. *Petitioner**

v.

Jayaseelam Chettiar and others .. *Respondents.*

Provincial Insolvency Act (*V of* 1920), *section* 10 (1)—*Debtor's petition for adjudication as insolvent on ground of inability to pay debts —Creditor alleging possession of assets—Petition held not* bona fide—*Dismissal of application on* a priori *consideration not valid.*

Expression of inability by the debtor to pay his debts cannot lightly be disregarded by Courts on a *priori* considerations. The Provincial Insolvency Act itself prescribes the procedure to be followed on the date when such an application for adjudication is set for hearing. The proviso to section 24 (1) (*a*) of the Act creating a bar against any further evidence in case there are *prima facie* grounds to believe that the debtor is unable to pay his debts has some significance. The statement of the debtor that he was not able to pay the decree debt is sufficient *prima facie* proof that he wants to be adjudicated on that ground. The Provincial Insolvency Act does not enable the Court to dismiss such application on a *priori* considerations. [*Para* 1.]

Case referred to :—

Cehatrapat Singh Dugar v. *Khwarag Singh Lachmiram*, (1917) I.L.R. 44 Cal. 535 : (1971) 32 M.L.J. 1 : 44 I.A. 11 : 39 I.C. 788 : A.I.R. 1916 P.C. 64.

Petition under section 75 (Provincial Insolvency Act, praying the High Court to revise the order of the District Court East Thanjavur at Nagapattinam, dated 3rd December, 1974 and made in C.M.A. No. 60 of 1973 (I.P. No. 5 of 1972, Sub-Court, Nagapattinam).

R. Harikesavan, for Petitioner.

K. Sengottian, for Respondent.

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* C.R.P. No. 760 of 1975. 26*th March*, 1976

The Court made the following

ORDER.—The Court below ought not to have dismissed the petitioner's application for adjudication as an insolvent under section 10 (1) of the Provincial Insolvency Act, 1920. The petitioner's case in his petition was that he has incurred loans in cultivation and agricultural operations and incurred debts to the tune of Rs. 7,200 which is inclusive of a decree debt admittedly obtained against him by one of his creditors who is the first respondent in the application filed in the lower Court. It is not in dispute that the first respondent obtained a decree in O.S. No. 418 of 1971 on the file of the District Munsif's Court, Nagapattinam and that he has levied execution against him and obtained also an order of arrest in execution of the decree. Consequent upon such harassment by his creditors and his inability to pay the debts disclosed by him in the schedule to the petition, the petitioner came to Court with an application for voluntary adjudication, of himself as an insolvent. Excepting the first respondent, other creditors did not contest. The first respondent's case was that the debts disclosed by the petitioner other than the decree debt owing by him to the first respondent, were not true and genuine. According to the first respondent the petitioner is a rich mirasudar and that he owns amongst other things, a flour mill at Nagapattinam. He would contend that there has been an obvious suppression of such assets by the petitioner and that therefore the petition has to be dismissed. The learned Sub-Judge found that the petitioner owed the decree debt. But he would accept the first respondent's case that the petitioner owns a running flour mill besides a building and that as the petitioner is running the same, he should be presumed to be the owner thereof. The case of the petitioner in the lower Courts and before me is that the mill does not belong to him and it is not one of his assets. Nevertheless the Courts below found that the petition was not a *bona fide* one and dismissed the application for adjudication. It is as against this the present Civil Revision Petition has been filed. The application for adjudication made by the debtor and initiated on his own volition is one which has to be scrutinised and disposed

of in accordance with the provisions of the Provincial Insolvency Act as this is arising under that Act. When a person who claims himself to be a debtor wants to badge himself as an insolvent by invoking the process of law and stating that he is unable to pay his debts to his creditors, then such an overt expression of inability on the part of the debtor cannot lightly be disregarded by Courts on *a priori* considerations. In the instant case the firts respondent has not only obtained a decree, but in execution he is seeking to arrest the petitioner. Obviously in order to avert an arrest and also for the reason that he was unable to pay his debts, the petitioner has filed the present application under section 12 of the Provincial Insolvency Act. The petition contains the contents which an insolvency petition should contain and the act of insolvency thereto is that he is unable to pay his debts. The first respondent, as creditor, opposes this on the ground that there has not been a true and full disclosure of the assets of the petitioner. In particular his case is that the flour mill in Nagapattinam is an asset belonging to the petitioner and he having not disclosed the same, should be deemed to have presented this application without any *bona fides* and that therefore the application merits dismissal. But the Act itself prescribes the procedure to be followed on the date when such an application is set for hearing. It says under proviso to section 24 (1) (*a*) of the Provincial Insolvency Act that where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are *prima facie* grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence thereon. The legal interdict created by the language in the proviso as above in the matter of creation of a bar to hear any further evidence in case there are *prima facie* grounds to believe that the debtor is unable to pay his debts, has some significance. As in the instant case, if a creditor puts forward a story that the petitioner-debtor is possessed of assets, it proves that at that stage, it would not be necessary for the Court to hear any further evidence thereon, if it is satisfied about the inability of the debtor to pay his debts. No further proof of inability to pay one's debts is his necessary then his own solemn affirmation. This might appear to be a general observation. In the particular case, there is admittedly a decree as against the petitioner which is more than Rs. 500. The petitioner says that he is unable to pay his debts. *Prima facie*, therefore, there are grounds to believe the same in the sense that the petitioner is seeking for a voluntary adjudication and for the self-imposition of a badge of insolvency on him on the ground that he is unable to pay such debts at that stage; it appears to me that the Court is not bound to enter into any further investigation and much less hear any further evidence on the opulence or the ability of the petitioner to pay his debts. What the first respondent is attempting to do in this case is to disprove the allegation that the petitioner is unable to pay his debts by stating that the petitioner is possessed of assets to wit, flour mill in Nagapattinam. Apart from the facts that the petitioner is disclaiming such an asset and is asserting that it is not his, it would be beyond the scope of the inquiry as contemplated in the proviso as above for the Court to embark upon such an investigation to find ultimately whether the petitioner is able or unable to pay his debts. As already stated, this statement of the debtor that he was not able to pay the decree debt which is not in dispute, is sufficient *prima facie* proof that he wants to be adjudicated on that ground. The lower Court misdirected itself in causing a superficial inquiry to be held about the ownership of the Mill and ultimately to come to the conclusion that the petition is not a *bona fide* one. The provisions of the Provincial Insolvency Act, 1920 did not enable the Court to dismiss such application on such *a priori* considerations. In *Cehatrapat Singh Dugar* v. *Khwrag Singh Lachmiram*[1], it is said that if any such situation arises, the stage at which the Court can visit the petitioner with any alleged consequences of any misconduct of the debtor, is when the debtor applies for discharge and not on the initial proceedings, when

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1. (1917) I.L.R. 44 Cal. 535: (1917) 32 M.L.J. 1: 44 I.A. 11: 39 I.C. 788: A.I.R. 1916 P.C. 64.

an application under the Act is made by the debtor himself to be declared as an insolvent. If such an inquiry is contemplated, the Act should have specifically provided for it. It has not. The reason appears to be obvious. The Official Receiver who would come into the picture after adjudication and who represents the body of creditors, would necessarily investigate into the question for the benefit of the creditors and if any asset has been screened by the debtor, he would bring the same into the pool for the purpose of division amongst the body of creditors. For this and for the reasons already stated, the lower Courts failed to exercise jurisdiction in law and had committed an apparent error in having dismissed the application for voluntary adjudication. The civil revision petition is allowed. No order as to costs.

R.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*A. Varadarajan, J.*

Mariarputham Nadachia Arputha Mary .. *Appellant**

v.

George and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 9—Suit for demarcation of boundaries and for damages—Decreed by trial Court and first appellate Court—Second Appeal by first defendant—Appeal allowed—Proper remedy is suit for declaration of title and for mandatory injunction.

The plaintiffs who owned S. No. 4212 filed a suit for demarcation of the boundaries and construction of a boundary wall between S. No. 4212 and S. No. 4211 and for damages for removing coconuts plucked from a tree alleged to be in S. No. 4212. The trial Court decreed the suit and awarded damages for the removal of coconuts. The first appellate Court also held in favour of the plaintiffs. On second appeal,

Held: The proper course was for the respondents (plaintiffs) to have asked for declaration of their title and for possession if the appellant and the second defendant had trespassed into any portion of S. No. 4212 and for a mandatory injunction for the restoration of the bund if the bund had in fact been removed by the appellant and the second defendant as alleged in the plaint. They should have asked for a permanent injunction restraining the appellant and the second defendant from interfering with their right to put up a bund on their property if they had interfered with the respondents' right to put up a bund. The respondents had not done any of these things. Under the circumstances, the suit for demarcation of boundaries was not maintainable and section 9 of the Code of Civil Procedure cannot help. [*Para.* 10.]

Cases referred to:

Kavasji Jamshetji v. *Hormasji Nassarvanjishet*, (1905) I.L.R. 29 Bom. 73; *Appayya Banga* v. *Koraga*, (1931) 60 M.L.J. 85: 129 I.C. 451: 32 L.W. 957: A.I.R. 1931 Mad. 19; *Miller* v. *Warmington*, (1830) 1 J. & K. 484; *Speer* v. *Crawter*, (1817) 2 Merivale 410; *Rayappan* v. *Yagappan Nadar*, (1958) K.L.T. 955: (1958) K.L.J. 1177.

Appeal against the decree of the Court of the Subordinate Judge, Padmanabhapuram, in Appeal Suit No. 255 of 1970, dated 21st March, 1972 preferred against the decree of the Court of the Principal District Munsif of Padmanabhapuram in O.S. No. 367 of 1967.

P. Ananthakrishnan Nair, for Appellant.

K. Sreekumaran Nair, for Respondent.

The Court delivered the following

JUDGMENT.—The first defendant who failed in both the Courts below is the appellant. The respondents filed the suit for demarcation of the boundaries between S. Nos. 4212 and 4211 of Valvachagoshtam Village, Kalkulam Taluk, and for putting up the northern boundary wall of S. No. 4212 at the cost of the appellant and the second defendant and for recovery of

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* S.A. No. 289 of 1973. *6th February, 1976.*

Rs. 10 as damages in respect of the cocoanuts taken away from the tree standing on S. No. 4212. S. No. 4212 belonging to the respondents lies south of S. No. 4211 belonging to the appellant. The case of the respondents was that there was a bund separating the two fields and that it was removed by the appellant and the second defendant on 22nd May, 1967 and that the appellant took away cocoanuts valued at Rs. 10 from the aforesaid cocoanut tree.

2. The defence was that on the southern boundary of the appellant's property bearing S. No. 4211, there is a small bund, now in ruins, and that it is used as a footpath and that the appellant did not remove any bund and there is no necessity to restore any bund or wall. The appellant claimed the cocoanut tree as her own and contended that the respondents are not in possession of any cocoanut tree. She further contended that the land in her possession is higher in level than the respondents' land and that even if any portion of S. No. 4212 is included in that higher level land the respondents have lost their title to that property by her adverse possession.

3. The trial Court appointed a Commissioner for making local inspection and filing a report. The learned Commissioner filed his report (Exhibit A-3) and plan (Exhibit A-4). He has filed a second report (Exhibit B-2) and plan (Exhibit B-3). According to his first report the cocoanut tree from which the appellant is stated to have removed some cocoanuts stands on S. No. 4212. But according to the subsequent report (Exhibit B-2) that cocoanut tree stands on S. No. 4211. The trial Court accepted the first report of the Commissioner (Exhibit A-3) and did not place any reliance on the second report (Exhibit B-2) and found incidentally that the appellant has not acquired title to the cocoanut tree or any portion of S. No. 4212 by adverse possession that as the appellant was claiming the disputed cocoanut tree, she would have removed the fence "as alleged" and that the northern boundary wall should be put in accordance with the first report of the Commissioner (Exhibit A-3) at the cost of both the parties. The learned District Munsif further found that the appellant had removed 20 cocoanuts from the cocoanut tree and that the respondents are entitled to damages of Rs. 10. On these findings he decreed the suit as prayed for with costs.

4. The appellant took the matter in appeal. The lower appellate Court found that no mud *kasala* separated the two fields and no bund had been removed by the appellant and the second defendant and that the respondents should put up the boundary line at their cost on their property bearing S. No. 4212. The learned Judge agreed with the learned District Munsif that the cocoanut tree stood on the respondents' land bearing S. No. 4212 but differed from the learned District Munsif and held that there was no proof that the appellant and the second defendant plucked any cocoanut therefrom. However, the learned Judge has granted a decree declaring that the respondents are entitled to put up a boundary in their extent at their own cost demarcating their survey number 4212 from the northern survey number 4211 as per the Commissioner's plan Exhibit A-4 and thus modified the trial Court's decree and dismissed the appeal.

5. The respondents have alleged in paragraph 3 of the plaint that S. Nos. 4211 and 4212 were separated by a bund and that the appellant and the second defendant removed it on 22nd May, 1967. On this allegation what the respondents should have prayed for was a mandatory injunction directing the restoration of the alleged bund. But in prayer 'A' there is no reference to any bund, and what has been asked for is a decree for putting up the northern boundary wall for S. No. 4212 through Court at the common expense, of both the parties along the line marked F-E-D in the plaint sketch. There is no reference in any other part of the plaint to any boundary wall and as already stated reference has been made in paragraph 3 of the plaint only to both the survey numbers. As a matter of fact the existence of a bund between the two fields has been admitted in the written statement of the first defendant. The particulars of the wall claimed in prayer 'A' to be put up, namely, whether it is a granite wall or a

brick wall or a mud wall, whether it is a granite and cement mortar wall or granite and lime mortar wall or granite in mud wall or whether it is a brick in cement or brick in lime mortar or brick in mud wall or the dimensions of the wall, *viz.*, its height and thickness have not been mentioned. The plaint prayer 'A' is therefore very vague.

6. Now the learned counsel for the appellant invites my attention to a Bench decision of the Bombay High Court in *Kavasji Jamsetji* v. *Hormasji Nassarvanjishet*[1] and of Madhavan Nair, J., in *Appayya Banga* v. *Koraga*[2] and submits that a suit for demarcation of the boundaries of the properties is not maintainable. The prayer in the plaint in the Bombay case was to recover from the defendants possession by severance and demarcation of 2 acres and 37 gunthas of land out of the area described in the plaint allowing the defendants to retain possession of as much land thereout as they could possibly retain consistently with it. The learned Judges have extracted the following observations of Lord Eldon in *Miller* v. *Warmington*[3], in their decision :

> "But if the difficulty of finding the boundaries were established, it is clear the plaintiff does not stand in a predicament that gives him a right to apply for a commission. This is the case of persons claiming by an adverse title; there is no connection between them to serve as a foundation for the Court to proceed on in ordering a commission. The subject was very luminously considered by the late Master of the Rolls in *Speer* v. *Crawter*[4]; and that case has settled that you must lay a foundation for this species of relief, not merely by showing that the boundaries are confused, but that the confusion has arisen from some misconduct on the part of the defendant, or those under whom he claims of which you have a right to complain, and which renders it incumbent on him to co-operate in re-establishing them. But the Court will not interfere between independent proprietors, and confusion of boundaries *per se* is no ground to support such a bill."

After extracting this observation the learned Judges have observed that in that case the litigants were independent proprietors and it was impossible to regard them as individuals having such relations the one to the other as would entitle them to treat the whole of the land in their possession as a common fund capable of adjustment in such a way as to enable them to give 4/22 of the whole to one and the remaining 18/22 to the other, and that in their opinion the plaintiff in that case had not shown a sufficient equity in himself as against the defendants in the suit, more especially when regard is to be had to the findings of fact by the lower appellate Court.

7. This decision has been referred to in the aforesaid decision of Madhavan Nair, J. and the principle laid down in that decision has been accepted by the learned Judge who has observed that in his opinion the principle in a case of confusion of boundaries the Courts will not interfere unless some equity is super-induced by the act of the parties has to be applied with reference to the special features of each case. The learned Judge has, no doubt, added that he does not think that the principles enunciated in that case preclude the Courts from interfering in cases where obviously refusal to interfere will cause injustice to the plaintiff on account of misconduct on the part of the defendant with respect to property.

8. The learned counsel for the respondents relies upon the decision of Varadaraja Iyengar, J., in *Rayappan* v. *Yagappan Nadar*[1]. That was a case where the suit was for putting up a boundary wall between the plaintiff's northern plot and the defendant's southern plot and to remove portion of item 2 building belonging to the defendant to the extent it abuts into the plaintiff's plot. The plaint averred that there existed no common boundary and that the parties were not aware that item 2 had made at the

1. (1905) 29 I.L.R. Bom. 73.
2. (1931) 60 M.L.J. 85 : 129 I.C. 451 : 32 L.W. 957 : A.I.R. 1931 Mad. 19.
3. (1820) 1 Jac. & W. 484 at 492.
4. (1817) 2 Merivale 410 at 417.

1. 1958 K.L.J. 1177 : 1958 K.L.T. 955.

time of its construction an incursion into the plaintiff's plot. The plaintiff had got the property measured by the Taluk Office and the defendant's refusal to abide by it had rendered the suit necessary. The question as to how far Courts will entertain a suit for resolving a confusion of boundaries when the plaintiff is unable to say what exactly was his property was canvassed before the learned Judge, who has observed :

> " The rule in these cases is well settled by a long line of English authorities that as between the independent proprietors, confusion of boundaries *per se* does not furnish a ground for Court's interposition unless some equity is superinduced by the act of parties as some particular circumstances of fraud or confusion where one party has ploughed too near the other or the like."

The learned Judge further observed that the mere fact that the boundary in between is not fixed does not mean that there is a confusion within the meaning of the rule.

9 This decision far from helping the respondents would support the contention raised by the learned counsel for the appellant on the basis of the aforesaid two decisions.

10. The respondents should have asked for declaration of their title and for possession if the appellant and the second defendant had trespassed into any portion of S. No. 4212 and they should have asked for a mandatory injunction as already stated, for the restoration of the bund if the bund had in fact been removed by the appellant and the second defendant, as alleged in the plaint. They should have asked for a permanent injunction restraining the appellant and the second defendant from interfering with their right to put up a bund on their property if they had interfered with the respondent's right to put up the bund. The respondents have not done any of these things and have merely asked for demarcation of the boundaries and construction of a boundary wall between the two properties and have sought to recover damages of Rs. 10 on the assumption that the cocoanut tree from which cocoanuts are alleged to have been plucked by the appellant stands in S. No. 4212 and is in their possession. Under the circumstances, I agree with the learned counsel for the appellant and find that the suit for demarcation of the boundaries is not maintainable and section 9 of the Code of Civil Procedure, relied upon by the learned counsel for the respondents will not help them.

11. The learned counsel for the appellant rightly submits that the lower Court having found that the appellant and the second defendant had not removed any bund and that the appellant has not plucked any cocoanuts from the cocoanut tree, the appeal should have been allowed and the suit should have been dismissed the very cause of action for the suit having been found against by the lower appellate Court. This submission is well-founded. The lower Court having found the very cause of action alleged by the respondents to have not been established by the evidence, he should have straightaway dismissed the suit and not granted a decree allowing the respondents to raise a boundary wall on their own property bearing S. No. 4212 at their own cost in accordance with the Commissioner's plan Exhibit A-4.

12. The second appeal is therefore allowed with costs throughout and the suit is dismissed. No leave.

S.J. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*A. Varadarajan, J.*

Periaswamy Muthiriar .. *Appellant**

v.

Palaniammal .. *Respondents.*

Partition—Purchaser from a co-owner—Suit for partition—Not entitled to mesne profits from other co-owner until allotment is made—Absence of allegation regarding income—Relief of accounting could not be granted.

The only right of a purchaser of a coparcener's interest in joint family property.

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*S.A. No. 1343 of 1972. *3rd November,* 1975.

is to sue for partition and ask for allotment to him of that which on partition might be found to fall to the share of the co-parcener whose share he has purchased. The purchaser is entitled to possession, only after allotment is made in the partition suit, and he is not entitled to profits until then. [*Para.* 4.]

In the absence of any allegation in the plaint that the co-owner in possession was deriving any income from the property, no relief of accounting could be granted. [*Para.* 4.]

Cases referred to:

Nandula Bhavani Sankaram v. *Saladi Mangamma*, (1948) 2 M.L.J. 412 : 61 L.W. 677 : A.I.R. 1949 Mad. 208 ; *Nagendram* v. *Appayya*, I.L.R. (1947) Mad. 763 : 60 L.W. 8 : (1947) 1 M.L.J. 15 : A.I.R. 1947 Mad. 285 ; *Satyanarayana* v. *Narasimha*, (1966) 1 S.C.R. 628 : (1967) 1 S.C.J. 110: A.I.R. 1966 S.C. 470; *Sohеshwar Mukerjee* v. *Bhubeshwar Prasad Narain*, (1953) 2 M.L.J. 789: 1953 S.C.J. 700: 67 L.W 1: 1954 S.C.R. 177: A.I.R. 1953 S.C. 487.

Appeal against the decree of the Court of the Subordinate Judge, Tiruchirapalli in Appeal Suit No. 238 of 1970, preferred against the decree of the Court of the District Munsif of Karur in Original Suit No. 974 of 1964.

V. Srinivasan, for Appellant.

K. Sarvabhauman and *T.R. Mani*, for Respondents.

The Court delivered the following

JUDGMENT.—The second defendant, who is the son of the first defendant, is the appellant. The respondent, who purchased the 'A' schedule property, a vacant site, from the first defendant, filed the suit for general partition of the 'B' schedule properties and allotment of the 'A' schedule property to her share and also for the relief of accounting from 12th October, 1962, the date of the purchase of the 'A' schedule property from the first defendant for a sum of Rs. 2,500. The first defendant did not contest the suit. The appellant's contention was that the proper Court-fee has not been paid and that the appellant was not liable to account for profits. The respondent paid additional Court-fee of Rs. 158 and both the Courts below have found that the Court-fee paid thereafter was correct. The learned District Munsif granted a decree of partition as prayed for and also for accounting from 12th October, 1962, without any discussion, although the appellant has contended that he is not liable for the profits claimed by the respondent, which would mean that the respondent was not entitled to any relief of accounting as against him.

2. The learned Subordinate Judge has observed in his judgment that under law one co-owner in occupation of the property is bound to account for the income of the same to the other, who is out of possession and, therefore, it is plain that the 2nd defendant-appellant has to account to the plaintiff for the income of the property.

3. The learned counsel for the appellant relies upon the decision in *Nandula Bhavani Sankaram* v. *Saladi Mangamma and others*[1], and contends that Court-fee has to be paid on the value of the alienee coparcener's share in the property. That decision arose out of an application for amendment of the plaint and is not in point. In the decision referred to in the trial Court's judgment (*Nagendram* v. *Appayya*[2]) it has been held specifically that the alienee could in no sense be described as a person in joint possession actually or even constructively along with the other members of the family and that the proper course on transposition of the original plaintiff as a defendant is to call upon the transferee-plaintiff to pay *ad valorem* Court-fee on the share of the properties which he was claiming. In view of the decision cited, I agree with the finding of the Court below regarding the Court-fee.

4. Admittedly, the 'A' schedule property is a vacant site. There is no allegation in the plaint that any income was derived from that property. In the absence of any allegation that the appellant was deriving any income from the

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1. (1948) 2 M.L.J. 412 : 61 L.W. 677 : A.I.R 1949 Mad. 208.
2. I.L.R. (1947) Mad. 763 : 60 L.W. 8: (1947) 1 M.L.J. 15 : A.I.R. 1947 Mad. 285.

'A' schedule property, no relief of accounting could be granted against the appellant. The learned Subordinate Judge has observed in his judgment that under law one co-owner in occupation of the property is bound to account for the income from the property to the other who is out of possession and that it is therefore, plain that the appellant has to account to the respondent for the income from the property. This view is erroneous, having regard to the facts of this case, where the respondent is a stranger-purchaser. The Supreme Court has observed in *Satyanarayana* v. *Narasimha*[1] thus :

> "Now it is well settled that the purchaser of a coparcener's interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased. His right to possession would date from the period when a specific allotment was made in his favour : *Soheshwar Mukherjee* v. *Bhubeshwar Prasad Narain*[2]. It would, therefore, follow that Sivayya was not entitled to possession till a partition had been made."

Therefore, I find that the respondent is entitled to possession only after allotment is made in the partition suit and he is not entitled to profits until then.

5. The appeals, therefore, allowed only in respect of the relief of accounting and is otherwise dismissed, but without costs. No leave.

R.S. *Appeal allowed.*

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1. (1966) 1 S.C.R. 628 : (1967) 1 S.C.J. 110 : (1967) 1 An.W.R. (S.C.) 29 : (1967) 1 M.L.J. (S.C.) 29 : A.I.R. 1966 S.C. 470.
2. 1953 S.C.J. 700 : (1953) 2 M.L.J. 789: 67 L.W. 1 : A.I.R. 1953 S.C. 487 ; 1954 S.C.R. 177.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*A. Varadarajan, J.*

Kathaperumal Pillai .. *Appellant**

v.

Murugesam Pillai and another
.. *Respondents.*

Transfer of Property Act (IV of 1882), section 52—Specific performance—Suit for possession—Agricultural lands—Purchased from Court in execution of compromise decree for specific performance—Land leased pending suit—Purchaser whether entitled to possession against tenants—Tenants not entitled to benefits under Tamil Nadu Cultivating Tenants Protection Act.

Though ordinarily the act of leasing of agricultural lands might be an act of management of the property and the title to the property continued with the defendant, in a suit for specific performance until a sale deed had been obtained by the plaintiff in that suit in pursuance of a decree obtained by him, having regard to the fact that certain rights in agricultural lands had been conferred on tenants by the Tamil Nadu Cultivating Tenants Protection Act, a lease in such a case would be affected by the doctrine of *lis pendens* under section 52 of the Transfer of Property Act. Therefore, the lease granted by the defendant in the suit for specific performance during the pendency of such suit would be hit by section 52. [*Para.* 7.]

Cases referred to:

Darbha Venkata Somayajulu v. *Patula Sathiraju*, (1936) 159 I.C. 93 : A.I.R. 1935 Mad. 875 ; *Ram Dayal* v. *Asghar Khan*, A.I.R. 1930 All. 289; *Penumatsa Subbaraju* v. *Veegasena Seetharamaraju*, (1916) I.L.R. 39 Mad. 283 : 28 I.C. 232 : (1915) M.W.N. 174 ; *Apaji Thamaji Patil* v. *Ragho Bhibraj Patil*, A.I.R. 1973 Bom. 75 (F.B.); *Chandrasekharan* v. *Kunju Vanniar*, (1975) 88 L.W. 216 : A.I.R. 1975 Mad. 227 ; *Arumugha Goundar* v. *Ardhanari Mudaliar*, (1975) 88 L.W. 113 : (1975) 1

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*S.A. No. 1429 of 1972. 5th November, 1975.

M.L.J. 385 : A.I.R. 1975 Mad. 231 ; *S. S. Rajabathar* v. *M. A. Sayeed*, (1974) 1 M.L.J. 166 : 87 L.W. 271 : A.I.R. 1974 Mad. 289 ; *Vedachari* v. *Narasimha Mudali*, (1923) 45 M.L.J. 825 : 19 L.W. 28 : 76 I.C. 793 : A.I.R. 1924 Mad. 307 ; *Sundara Ramanujam Naidu* v. *Sivalingam Pillai*, (1924) I.L.R. 47 Mad. 150 : 77 I.C. 542 : 18 L.W. 333 : 45 M.L.J. 431 : A.I.R. 1924 Mad. 360.

Appeal against the decree of the Court of the Subordinate Judge, Tiruchirapalli in Appeal Suit No. 241 of 1968, preferred against the decree of the Court of the District Munsif of Karur in Original Suit No. 589 of 1965.

P. S. Srisailam and *K. Venugopalan*, for Appellant.

V. C. Palaniswamy, E. Padmanabhan and *S. C. Palaniswamy*, for 1st Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff, who succeeded in the trial Court but failed in the lower appellate Court, is the appellant. He filed the suit for possession of agricultural lands. He had obtained the sale deed, Exhibit A-1, from the Court in execution of a compromise decree for specific performance obtained by him against the defendants in O.S. No. 133 of 1959 on the file of the Sub-Court, Tiruchirapalli. The defendants in that suit are not parties to the present action. The appellant obtained possession of the properties covered by Exhibit A-1 through the Court in E.P. No. 193 of 1964 on 21st September, 1964 with some standing crops which were said to be two months old, as seen from the delivery receipt, Exhibit A-2. His case was that thereafter at the instance of defendants 3 and 4, defendants 1 and 2 trespassed on the property on 21st October, 1964 and cut and carried away the crops. He, therefore, filed the suit for recovery of possession of the properties with past and future mesne profits.

2. The second defendant alone resisted the suit contending that he was a tenant of a portion of the suit property under the original owner under the insufficiently stamped and unregistered lease deed, Exhibit B-1, and that he continued to be in possession and could not be evicted in view of the provisions of the Tamil Nadu Cultivating Tenants Protection Act and was liable to pay only the rents. The lease deed, Exhibit B-1, which was insufficiently stamped had been validated by payment of the necessary stamp duty and penalty and has been relied upon by the Court below for the collateral purpose of showing the nature of possession of the second defendant.

3. The trial Court held that in view of section 52 of the Transfer of Property Act the lease under Exhibit B-1 is not valid and would not affect the appellant's right to recover possession of the property, and decreed the suit. But, on appeal, the learned Subordinate Judge held that the lease by the owners of the property pending the suit for specific performance of the agreement to sell these properties to the appellant was valid and entitled the second defendant to the benefits of the Tamil Nadu Cultivating Tenants' Protection Act and he allowed the appeal and modified the decree of the trial Court by dismissing the suit in respect of the western moiety in the plaint schedule properties which alone was in the possession of the second defendant. Hence this second appeal.

4. The learned counsel for the second defendant submits that the owners of the agricultural lands, who were the defendants in the said O.S. No. 133 of 1959, had title to the properties until the execution of the sale deed, Exhibit A-1, in pursuance of the decree for specific performance of the contract and were, therefore, entitled to lease a portion of the properties to the second defendant and he is entitled to the benefits of the Tamil Nadu Cultivating Tenants' Protection Act, and section 52 of the Transfer of Property Act will not apply. He relied upon certain decisions in support of his contention.

5. Pandrang Row, J., has held in *Darbha Venkata Somayajulu* v. *Patula Sathiraju*[1], that where a mortgagor had granted a lease of the mortgaged property after a suit had been brought to enforce the mortgage but before the decree, and the mortgagee, applied for appointment of a Receiver and the Court made an order directing the lessee to deposit a sum of

1. (1936) 159 I.C. 93: A.I.R. 1935 Mad. 875.

money in Court every year as annual rent, and the properties were sold in execution and purchased by the mortgagee who again applied for appointment of a Receiver claiming that the crops belonged to him after the sale, that the lease was not affected by the rule of *lis pendens* and the mortgages-purchaser acquired only the rights of his mortgagor and could therefore only claim his share represented by the rent and not the entire properties. Sen, J., has held in *Ram Dayal* v. *Asghar Khan*[1], that where during the pendency of a mortgage suit or proceedings consequential upon a decree passed in such suit the mortgagor in the ordinary course of the management of his property grants a lease of the mortgaged property in whole or in part for an adequate rent, the lease is not obnoxious to the provisions of section 52 of the Transfer of Property Act and the lessee holds the property subject to the rights of the mortgagee-decree-holder. A Bench of this Court has held in *Penumatsa Subbaraju* v. *Veegasena Seetharamaraju and another*[2] where after a decree for sale on a mortgage, the mortgagor who was in possession, granted a lease of his properties for one year with a covenant for payment of the rent on a particular day, that the creation of a lease for one year after a suit and decree on mortgage is not affected by the doctrine of *lis pendens* on the ground that such a lease is an ordinary incident of the beneficial enjoyment of a mortgagor who had been allowed to remain in possession. In my view, these decisions are not in point, having regard to the fact that when the leases in those cases were granted, there was no provision like the Tamil Nadu Cultivating Tenants' Protection Act conferring a right on the tenant to hold the property subject only to his liability to pay rent to the owner of agricultural lands.

6. The other decision relied upon by the learned counsel for the respondent is of a Full Bench of the Bombay High Court in *Apaji Thamaji Patil* v. *Ragho Bhivraj Patil and another*[3], where an owner of a land had created a simple mortgage over it and during the pendency of a suit by the mortgagee for sale of the mortgaged land, he had leased it and it has been held that it does not in any way effect the rights of the mortgagee as contemplated by section 52 of the Transfer of Property Act and that the tenant cultivating the land in such a case was lawfully cultivating the land and was entitled to the benefits of the Bombay Tenancy and Agricultural Lands Act. The question for consideration there was whether such a tenant was lawfully cultivating the land and entitled to the benefits of the Act. This decision also does not appear, in my opinion, to be in point. The last decision relied upon by the learned counsel for the respondent is of a Full Bench of this Court in *Chandrasekaran* v. *Kunju Vanniar and others*[1], which arose out of a suit filed by the purchaser from a mortgagor for redemption of a usufructuary mortgage, and the defendants 1 and 2, who were the successors-in-interest of the usufructuary mortgagee, did not resist the suit, but defendants 3 and 4, who were in possession as tenants inducted by the usufructuary mortgagee resisted the suit on the ground that they were entitled to the benefits of the Tamil Nadu Cultivating Tenants' Protection Act. It has been held :

> "Even though the usufructuary mortgage on the strength of which the mortgagee let out to the tenant has been redeemed, since the tenancy originated in an agreement and since because of the redemption, such an agreement came to an end but the tenant continued to be in possession, he will squarely be within the inclusive definition of the term 'cultivating tenant' entitled to the benefits of the Act."

This decision also is not in point, as the lease in that case was not pending a suit and therefore the question whether section 52 of the Transfer of Property Act applied, did not arise for consideration in that suit.

7. The learned counsel for the appellant submits that in a suit for specific performance, in the event of a decree, the successful plaintiff is entitled to be put in possession of the properties and that this

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1. A.I.R. 1930 All. 289.
2. (1916) I.L.R. 39 Mad. 283 : 28 I.C. 232 : 1915 M.W.N. 174.
3. A.I.R. 1973 Bom. 75 (F.B.).

1. (1975) 88 L.W. 216 : A.I.R. 1975 Mad. 227. (F.B.)

lease by the defendant in such a suit pending that suit will defeat the rights of the plaintiff, especially when there is a provision like the Tamil Nadu Cultivating Tenants' Protection Act, and therefore section 52 of the Transfer of Property Act will apply. He relied upon a Full Bench decision of this Court in *Arumugha Goundar* v. *Ardhanari Mudaliar and others*[1], where a tenant who had been let into possession of the land and incidental immovable property by a Receiver appointed by Court pending a suit was held to be not entitled to protection under the Tamil Nadu Cultivating Tenants' Protection Act, on the ground that by the act of the Receiver letting the tenant in possession, the property has been placed beyond the reach of the Court to give the plaintiff the remedy he sought which, the Court held, he would be entitled to and that the intention of the Act was not to cover such a case, as, according to the preamble of the Act, it is one for the protection from eviction of cultivating tenants in certain areas in the State of Madras because it is necessary to protect such tenants in these areas from unjust eviction. Ismail, J., following a decision of a Bench of this Court *Sundara Ramanujam Naidu* v. *Sivalingam Pillai*[2], has held in *S. S. Rajabathar* v. *M. A. Sayeed*[3], that a direction to deliver possession of the property is incidental to a decree for specific performance of an agreement to sell immovable property, and, therefore, the executing Court has jurisdiction to order delivery of possession, although the decree in the suit for specific performance does not specifically provide for delivery of possession and that the executing Court has jurisdiction to grant the relief of possession as incidental to the execution of the decree for specific performance of a contract of sale. Therefore, the plaintiff in a suit for specific performance is entitled in the event of his succeeding in that suit, to be put in possession of the properties even in cases where the decree is silent and does not specifically say that he is entitled to be put in possession of the properties. A Bench of this Court has held in *Vedachari* v. *Narasimha Mudali and others*[1], that the doctrine of *lis pendens* applies to suits for specific performance of agreements to sell immovable properties and that it applies to Court sales as well as to private sales. Therefore, though ordinarily the act of leasing of agricultural lands may be an act of management of the property and the title to the property continues with the defendant, in a suit for specific performance until a sale deed had been obtained by the plaintiff in that suit in pursuance of a decree obtained by him, having regard to the fact that certain rights in agricultural lands have been conferred on tenants by the Tamil Nadu Cultivating Tenants' Protection Act, in my view, a lease in such a case would be affected by the doctrine of *lis pendens*, under section 52 of the Transfer of Property Act. Therefore, I agree with the learned counsel for the appellant that the lease in this case admittedly granted by defendants in the suit for specific performance during the pendency of that suit is hit by section 52 of the Transfer of Property Act and that the appellant is entitled to possession of even the other moiety.

8. The appeal is, therefore, allowed with costs payable by the second defendant-first respondent. The trial Court's decree regarding mesne profits will stand. No leave.

S.J. *Appeal allowed.*

1. (1975) 1 M.L.J. 385 : (1975) 88 L.W. 113 : A.I.R. 1975 Mad. 231.
2. (1924) I.L.R. 47 Mad. 150 : 77 I.C. 542 : 18 L.W. 333 : 45 M.L.J. 431 : A.I.R. 1924 Mad. 360.
3. (1974) 1 M.L.J. 166 : 87 L.W. 271 : A.I.R. 1974 Mad. 289.

1. (1923) 45 M.L.J. 825 : 19 L.W. 28 : 76 I.C. 793 : A.I.R. 1924 Mad. 307.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*A. Varadarajan, J.*

Madiammal .. *Appellant**

v.

Glory Chandrakantha .. *Respondent.*

Partnership Act (IX of 1932), section 22—Registration Act (XVI of 1908), section 17—Indian Stamp Act (II of 1899), section 36—Suit for declaration—Deed of partition in a partnership whether requires registration—Registration not necessary—Document admitted by trial Court—Cannot be questioned for want stamp on appeal.

In a suit for declaration of title to the suit property the plaintiff filed a document which was an unregistered deed of of partition of the assets of a partnership. The question came up as to whether the deed required registration The trial Court admitted the document in evidence. At the appellate stage the admissibility of the document was questioned for want of stamp and the contention was accepted. On further appeal,

Held: The concerned document was a record showing the division of the assets of a dissolved firm and section 22 of the Partnership Act applied and the document did not require registration.

[*Para.* 14].

The record showed that the document had been admitted in evidence. It was not open at the appellate stage to contend that it was inadmissible in evidence for want of stamp even if it required any stamp as it had already been admitted in evidence by the trial Court.

[*Para.* 16.]

Cases referred to:—

Bageshwai Charan v. *Jagarnath Kurai*, 62 M.L.J. 296: 59 I.A. 130: 136 I.C. 798: A.I.R. 1932 P.C. 55; *Jiwan Ali Beg* v. *Bana Mal*, (1887) I.L.R. 9 All. 108; *Ranganayaki Ammal* v. *Virupakshee Rao Naidu*, 45 M.L.J. 100: 17 L.W. 588: 72 I.C. 456: A.I.R. 1923 Mad. 621; *Baldeo Singh* v. *Udal Singh*, A.I.R. 1921 All. 248; *Nachiappa* v. *Subramaniam*, (1960) 1 An. W.R. (S.C.) 101: (1960) 1 M.L.J. (S.C.) 101: (1960) 2 S.C.R. 209: A.I.R. 1960 S.C. 307; *Sakharam Krishnaji* v. *Madan Krishnaji*, (1880) I.L.R. 5 Bom. 232; *Kashinathsa* v. *Narasingasa*, (1961) 3 S.C.R. 792: (1962) 2 S.C.J. 597: A.I.R. 1961 S.C. 1077; *Ramappa* v. *Thirumalappa*, I.L.R. (1939) Mad. 971: (1939) 2 M.L.J. 649: 50: L.W. 331: A.I.R. 1939 Mad. 884; *Narayanappa* v. *Bhaskara Krishnappa*, (1966) 2 S.C.J. 490: (1966) 3 S.C.R. 400: A.I.R. 1966 S.C. 1300. *Ratan Lal* v. *Purshotham*, (1974) 3 S.C.R. 109: A.I.R. 1974 S.C. 1066; *A. Narayanappa* v. *B. Krishtappa*, (1959) 1 An. W.R. 300: A.I.R. 1959 A.P. 380; *Commissioner of Income-Tax, West Bengal Calcutta* v. *Juggilal Kumalpet*, (1967) 1 I.T.J. 142: (1967) 1 S.C.J. 177 A.I.R. 1967 S.C. 401; *Gopal Das* v. *Sri. Thakurji*, (1943) M.L.J. 51: 56 L.W. 593: A.I.R. 1943 P.C. 83; *Pir Sidik Mahomed Shah* v. *Musammat Saran*, (1930) 58 M.L.J. 7 (P.C.): 121 I.C. 204: A.I.R. 1930 P.C. 57 (1); *Bhagat Singh* v. *Jaswant Singh*, (1962) 1 S.C.J. 162: A.I.R. 1966 S.C. 1861; *Forbes* v. *Steven*, (1870) 10 Eq. 178.

S.A. No. 228 of 1974.

Appeal against the decree of the District Court, Coimbatore West, at Coimbatore, in Appeal Suit No. 5 of 1971, preferred against the decree of the Court of the Subordinate Judge, Nilgiris, at Ootacamund, in Original Suit No. 83 of 1969.

C.M.P. NO. 493 of 1976.

Petition praying that in the circumstances stated therein the High Court will be pleased to grant leave to the petitioner to raise the following grounds as additional grounds of appeal in S.A. No. 228 of 1974.

N. Varadarajan, for Appellant.

R. Desikan, for Respondent.

The Court delivered the following

JUDGMENT:—The plaintiff, who succeeded in the trial Court but lost in the lower appellate Court, is the appellant. She filed the suit for declaration of her title to the suit property which is one acre of land with a terraced building in S. No. 153/6 of Jegathala Village

*S. A. No. 228 of 1974 and C.M.P. No. 493 of 1976.

3rd February, 1976.

in Coonoor Taluk and for a permanent injunction restraining the respondent from interfering with her possession of the property. Her case is that the suit property was purchased for Rs. 8,000 under Exhibit B-5, dated 8th December, 1954, by her brother, Mutha Gowder (P.W 1) and one Boja Gowder, the father of Sevanan (D.W. 1), who were partners of 'Mutha Gowder and Company'. There was a partition subsequent to the death of Boja Gowder in the beginning of 1957 after dissolution of the partnership had taken place prior to 1957 between P.W. 1 and D.W. 1 on 1st December, 1957. According to the appellant, Exhibit A-1 dated 1st December, 1957, which is unregistered is a partition list signed by P.W. 1 and D.W. 1 as well as the panchayatdars at whose instance the assets of the partnership were divided. Subsequently Mutha Gowder P.W. 1 gifted the suit property to the appellant under Exhibit A-4 dated 15th December, 1965 and she was in possession and enjoyment of the property since that date. But the respondent (D.W. 4) had taken the sale-deed, Exhibit B-8, dated 9th October, 1968, from D.W. 1 in respect of an undivided half-share in the suit property. Taking advantage of that sale-deed, D.W. 4 attempted to interfere with the appellant's possession of the suit property. The appellant claimed to have leased the cultivable land and to be living in the downstairs portion of the building. She alleged that the suit property is comprised in patta No. 460 and prayed for declaration and injunction.

2. The respondent denied that the suit property was purchased by the partnership, Mutha Gowder, as alleged in the plaint and contended that the property was purchased by P.W. 1 and Boja Gowder under Exhibit B-5 in their individual capacity. She put the appellant to proof of the existence of the partnership and its dissolution, as well as the allotment of the suit property to Mutha Gowder and contended that Mutha Gowder was entitled only to a moiety in the suit property and had no right to deal with it in its entirety. She claimed to have purchased Boja Gowder's half-share in the property under Exhibit B-8 and to have taken possession of her share on the south and to be exercising acts of cultivation and she contended that the appellant is only a co-owner who could sue only for partition and not for injunction.

3. The purchase of the suit property under Exhibit B-5 by Mutha Gowder (P.W. 1) and Boja Gowder and the execution of Exhibit A-1 by P.W. 1 and Boja Gowder's eldest son (D.W. 1) were admitted before the learned Subordinate Judge who tried the suit. The respondent (D.W. 4) objected to the admission of Exhibit A-1 in evidence for want of stamp and registration. But the learned Subordinate Judge, however, admitted it in evidence and considered only the question of its admissibility for want of registration. He found that P.W. 1 and D.W. 1 had not executed any arbitration muchalika in favour of their friends who acted as panchayatdars and that Exhibit A-1 was neither an award nor a partition-deed, but only a memorandum or list of a previously accomplished partition which had been acted upon and was admissible in evidence and that the suit property fell to the share of P.W. 1 in that partition and the appellant became the owner of the suit property by virtue of the gift under Exhibit A-4. He also found that the appellant was in possession and decreed the suit as prayed for with costs.

4. But, on appeal, the learned Additional District Judge found that in the prior suit, O.S. No. 59 of 1961 filed by D.W. 1 against P.W. 1 and another for including his name as a sharer to a moiety of the share taken in the name of P.W. 1 in 'N.M.T. Transport,' on the basis of an agreement, dated 1st December, 1957, P.W. 1 denied any agreement dated, 1st December, 1957, and that it was, therefore, not open to P.W. 1 to base any claim on Exhibit A-1 subsequently. He further found that the partition of the partnership assets on dissolution of the partnership of P.W. 1. and D.W. 1's father was made only under Exhibit A-1 and that Exhibit A-1 is a partition deed requiring registration and that it could not be admitted in evidence for want of registration. He found that the appellant had not proved her exclusive title to the suit property and her exclusive possession thereof and that, on the other hand, the respondent had proved her title to a half share and her possession of the property as a co-owner. On these

findings he allowed the appeal with costs throughout.

5. The suit property called "Aravankadu Building" forms item 4 in Exhibit A-1 which is to the effect that P.W. 1 should take it and pay Rs. 5,000 to D.W. 1. Pallivasal Veedu, forming item 3 in Exhibit A-1 should go according to it, to D.W. 1, who should pay Rs. 2,000 to P.W. 1 for taking it. D.W. 1 has admitted that he had subsequently sold away this property to a third party under Exhibit A-2, dated 28th May, 1960. Exhibit A-1 is to the effect that some other properties would have to be divided in moieties subsequently. Therefore, if there had been a partition between P.W. 1 and D.W. 1, who is stated to have represented his father in the partition, of the assets of the dissolved firm 'Mutha Gowder & Company' and Exhibit A-1 is admissible in evidence, it would be clear that P.W. 1 would have had exclusive title to the suit property before he gifted it to the appellant under Exhibit A-4, dated 15th December, 1965. The respondent had put the appellant to proof of not only the existence of the partnership firm but also of its dissolution and allotment of the suit property to P.W. 1. P.W. 1 has stated in his evidence that the suit property belonged to himself and Boja Gowder by right of purchase and they were carrying on partnership business. He has also stated that the partnership had come to an end in about 1956 and that after the death of Boja Gowder there was a partition of the assets of the partnership and that the suit property fell to his share in that partition effected in the presence of panchayatdars between himself and P.W. 1. He has stated that Exhibit A-1 is a list signed by himself and D.W. 1 as well as by the panchayatdars. He has admitted that the partition was effected only on 1st December, 1957, as decided by the panchayatdars and that there is no partition-deed apart from Exhibit A-1. D.W. 1 had stated in his examination-in-chief that no partition had yet been effected although Exhibit A-1 had been executed and that there was no partition prior to Exhibit A-1. He had also stated that he had a half share in the suit property until he sold it to the respondent under Exhibit B-8. But in his cross-examination he has admitted that he and P.W. 1 put their signatures under each item in Exhibit A-1 after the completion of the discussion in respect of each item, that he took over the tea-shop mentioned as item 1 in Exhibit A-1 and carried on the business solely from 1958 as per Exhibit A-1, that he is exclusive possession of the commission shop forming item 8 in Exhibit A-1 and that he had not obtained the signature of P.W. 1 in the sale-deed executed by him in favour of a third party in respect of Pallivasal Veedu forming item 3 in Exhibit A-1. He has added that Exhibit A-1 has not been acted upon only in respect of the suit property. The evidence of P.W. 1 and D.W. 1 establishes that the assets of the partnership had been divided between them and the partition had been accepted and agreed upon by both of them P.W. 1 had executed the settlement deed, Exhibit A-4, in respect of the entire suit property in favour of the appellant. The appellant would have title to the suit property by virtue of the gift under Exhibit A-4 if P.W. 1 had become the exclusive owner of the property which had been purchased by himself and the other partner Boja Gowder by reason of the said partition.

6. The learned Subordinate Judge held on a consideration of the evidence, that the appellant was in possession of the suit property on the date of the suit. The respondent has admitted in her evidence that possession of the house had not been handed over to her in pursuance of the sale under Exhibit B-8 and that the appellant's son, P.W. 5, is living in a portion of the building and had rented out the other portion. The learned Subordinate Judge rightly disbelieved the evidence of D.W. 4 that she is cultivating a portion of the cultivable portion of the suit property having regard to the fact that the respondent claimed to be in possession of the southern half of the land while the sale-deed, Exhibit B-8, is in respect of an undivided half-share in the suit property. A part from the oral evidence on the side of the appellant there are the kist receipts (Exhibit A-5 series) and house-tax receipts (Exhibit A-6 series). There is no dispute that the suit land is comprised in patta No. 460. Exhibit A-5 series shows that both Mutha Gowder and Sevanan (P.W. 1 and D.W. 1) paid the kist for the suit property for faslis 1373 to 1376 and that the appellant had paid kist for the

property for fasli 1378. The house-tax receipts (Exhibit A-6 Series) show payment of property tax for the house by the appellant for some half-years from 1966 to 1968. The respondent, who was admittedly aware at the time of her purchase under Exhibit B-8 that the suit building stood in the name of the appellant in the municipal records, did not ask D.W. 1 as to how it happened to be so and had taken the sale-deed, Exhibit B-8, with full knowledge of the fact that P.W. 1 had already executed the gift-deed Exhibit A-4, in favour of the appellant, and has not produced any kist receipt or house-tax receipt to show her possession of the suit property. The learned Subordinate Judge was, therefore, perfectly justified in rejecting the oral evidence on the side of the respondent and accepting the evidence on the side of the appellant and holding that the appellant was in possession of the suit property on the date of the suit, without attaching much significance to the complaint, the original of Exhibit B-7, given by P.W. 5 to the Sub-Inspector of Police, Aravankadu, that she saw the respondent trying to exercise acts of cultivation on a portion of the suit-land which was lying fallow after both the parties has given an undertaking before the Inspector of Police, Coonoor, that nobody should enter on the land until he came and inspected the same. Exhibit B-7 would not amount to any admission of the respondent's possession of the suit property. Under the circumstances, the finding of the learned Additional District Judge that the appellant had not proved her exclusive possession of the suit property is not at all acceptable. I agree with the learned Subordinate Judge and find that the appellant was in possession of the suit property on the date of the suit.

7. The suit property had been purchased under Exhibit B-5, dated 8th December, 1944, by P.W. 1 and D.W. 1's father, Boja Gowder, who indisputably, were partners of Mutha-Gowder & Company at that time. The evidence of P.W. 1 that the partnership properties were divided subsequent to the dissolution of the partnership after the death of Boja Gowder on 1st December, 1957, has not been challenged in cross-examination. The respondent has not disputed the allegation in the plaint that Boja Gowder died early in 1957. The partition was, therefore, between P.W. 1, one of the partners of the dissolved firm, and D.W. 1, the eldest son of the other deceased partner. This is also made clear by Exhibit A-1 which reads:

"ஜே.பி. முத்தா கவுடர் ஷி கம்பெனி (1) ஜே.பி. முத்தா கவுடர் (2) ஜே. ஹச். போஜா கவுடருக்காக அவர் குமாரன் ஜே. பி. சௌவன் நாங்கள் இருவரும் சேர்ந்து பாகம் பிரித்துக்கொண்ட விவரங்கள் பின்வருமாறு....

The evidence of P.W. 1 is only to the effect that at the instance of the Panchayatdars he and D.W. 1 got the assets of the dissolved firm divided and not that the panchayatdars themselves effected the division and he and D.W 1 accepted the same. As already stated, P.W. 1 has admitted in his evidence that the partition was effected only on 1st December, 1957 and that there is no other document evidencing the partition except Exhibit A-1. No doubt the evidence of D.W. 1 shows that he and P.W. 1 put their signatures under each item after a settlement was reached in regard thereto by discussion. But it is not possible to infer that the partition of the assets of the dissolved firm was prior in point of the time and dissociated in any way from Exhibit A-1. As regards the suit property and Pallivasal Veedu it is stated in Exhibit A-1 that D.W. 1 should take Pallivasal Veedu and pay Rs. 2,000 to P.W. 1 and that P.W. 1 should take the suit property and pay Rs. 5,000 to D.W. 1. Therefore, I agree with the learned Additional District Judge that the partition has been effected only under Exhibit A 1 and that it required registration as a partition-deed if it did not relate to the division of the assets of the dissolved firm between a partner and the representative of the deceased partner.

8. The learned counsel for the appellant submitted that Exhibit A-1 is only a list of a previously accomplished partition and that it does not require registration. In this connection he relied upon the decision of the Privy Council in *Bageshwai Charan* v. *Jagarnath Kurai*[1] where it is observed:

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1. 62 M.L.J. 296: 59 I.A. 130: 136 I.C. 798: A.I.R. 1932 P.C. 55.

"In the case of *Jiwan Ali Beg* v. *Bana Mal*[1] the head-note accurately sets forth one of the points in the case:
'An instrument to come within section 17 (*b*), Registration Act (III of 1877), must in itself purport or operate to create, declare, assign, limit or extinguish some right, title or interest of the value of Rs. 100 or upwards in immovable property.'

Then in the case of *Ranganayaki Ammal* v. *Virupakshee Rao Naidu*[2] the learned Judge in the High Court expressly cited the words of West, J., in *Krishnagi's case*[3] and in the case of *Baldeo Singh* v. *Udal Singh*[4] precisely the same thing is done.

Their Lordships have no doubt that this track of decision is right. Though the word 'declare' might be given a wider meaning, they are satisfied that the view originally taken by West, J. is right. The distinction is between a mere recital of a fact and something which in itself creates a title. The distinction has been acted on in cases connected with mortgages by deposit of documents of title..................
In the present case the statement in the petition of the respondent did not create any right in the Thakur. It merely acknowledged as a fact that such right was his. There was therefore no necessity for registration."

The question in that case was whether a particular statement in the petition signed by the maker amounted to an acknowledgment of liability within the meaning of section 19 of the Limitation Act.

This decision will not help the appellant, having regard to the fact that the lower appellate Court found, and I agree with it, that the partition was effected only under Exhibit A-1 and that it is not a list of properties which had been previously divided.

1. (1887) I.L.R. 9 All. 108.
2. (1923) 45 M.L.J. 100: 17 L.W. 588: 72 I.C. 456: A.I.R. 1923 Mad. 621.
3. (1880) I.L.R. 5 Bom. 232.
4. A.I.R. 1921 All. 248.

9. The other decision relied on by the learned counsel for the appellant is of the Supreme Court in *Nachiappa* v. *Subramaniam*[1]. There it is observed;

"In *Sakharam Krishnaji* v. *Madan Krishnaji*[2] West J., had observed that the word 'declare' in section 17 (1) (*b*) is placed along with 'create', 'assign', 'limit' or 'extinguish' a right, title or interest, and these wordsimplya definite change of legal relation to the property by an expression of will embodied in the document referred to, and had added that he thought that it is equally the case with the word 'declare'. On the other hand, certain other decisions had construed the word 'declare' liberally in a very wide sense and it was on those decisions that the objection against admissibility of the petition was founded. In repelling the objection Lord Dunedin observed that 'though the word "declare" might be given a wider meaning they are satisfied that the view originally taken by West, J., is right. The distinction is between a mere recital of fact and something which in itself creates a title.."

This decision also will not help the appellant, as there is no partition dissociated from Exhibit A-1 in point of time.

10. The third decision relied on by the learned counsel for the appellant is of the Supreme Court in *Kashinathsa* v. *Naraingasa*[3] where it is observed:

"The records made by the Panchas were documents which merely acknowledged partitions already made and were not by law required to be registered. On a perusal of Exhibit 456-A which is a translation of the Tippan book in which are recorded the decisions which are signed by the parties, it is evident that the Panchas were

1. (1960) 1 An. W.R. (S.C.) 101: (1960) 1 M.L.J. (S.C.) 101: (1960) 2 S.C.R. 209: A.I.R. 1960 S.C. 307.
2. (1880) I.L R. 5 Bom. 232.
3. (1961) 3 S.C.R. 792: (1962) 2 S.C.J. 597: A.I.R. 1961 S.C. 1077.

merely recording what had been actually divided and they were not seeking to set out their decisions relating to division of property to be made."

This decision also would not apply to the facts of the present case where the panchayatdars appear to have merely advised P.W. 1 and D.W. 1 to have the assets of the dissolved firm divided and had not themselves actually divided the same, and there was no prior partition.

11. The learned counsel for the appellant submitted that Exhibit A-1 is only a list showing the division of the assets of the dissolved firm between a partner and the representative of the deceased partner, having regard to the provisions of Section 22 of the Indian Partnership Act, which lays down that where land or any beneficial interest therein has become partnership property, it shall, unless the contrary intention appears, be treated, as between the partners including the representatives of a deceased partner and also as between the heirs of a deceased partner and his executors or administrators, as personal or movable and not real or heritable estate. Having regard to the fact that the suit property had been purchased by P.W.1. and D.W.1's father Boja Gowder under Exhibit B-5 on 8th December, 1944, when they were partners of 'Mutha Gowder & Company' and it is seen from not only Exhibit A-1 but also from the evidence of P.W. 1 and D.W. 1 that even this item of property had been divided between them after the death of Boja Gowder which had taken place subsequent to the dissolution of the firm, the suit property must have been a partnership asset. Therefore, it is not possible to agree with the learned counsel for the respondent that it was not an asset of the dissolved firm.

12. The learned counsel for the respondent relied upon a decision of a Bench of this Court in *Ramappa* v. *Thirumalappa*[1] where it is observed:

"When allotting on a dissolution what remains after making provision for the firm's debts and the remaining assets include immovable properties, it does not follow that the partners will take the immovable properties in equal shares, even if they had equal rights in the partnership. What each partner receives will depend on the circumstances and the nature of the assets which remain for division. A partner, for instance, may have overdrawn his account and disentitled himself to equal rights, but it might have been otherwise. Exhibit A was drawn up and signed in order that the post-dissolution rights should be declared and placed beyond dispute. In our opinion, the declaration clearly falls within section 17, Registration Act, which means that the document cannot now be admitted in evidence (by reason of non-registration)".

This decision is referred to in the decision of the Supreme Court in *Narayanappa* v. *Bhaskara Krishnappa*[1], which will be referred to presently and though not specifically dissented from, must in my opinion, be deemed to have been dissented from. In that decision a different view has been expressed by the Supreme Court.

13. The next decision relied on by the learned counsel for the respondent is of the Supreme Court in *Ratan Lal* v. *Purshottam*[2] where the partners of a firm fell out and agreed to refer their disputes to two arbitrators. The arbitrators gave an award which expressly made an exclusive allotment of the partnership assets, including the factory and liabilities between the partners in consideration of a sum of Rs. 17,000 and another sum to the other on his renouncement of the right to share in the firm. So in express words the award purported to create rights in immovable property worth above Rs. 100 in favour of the other partner and it has been held that it therefore required registration and was inadmissible in evidence for want of registration. This decision will not apply to the

1. I.L.R. (1939) Mad. 971: (1939) 2 M.L.J. 649: 60 L.W. 331: A.I.R. 1939 Mad. 884.

1. (1966) 2 S.C.J. 490: (1966) 2 An. W.R. (S.C.) 60: (1966) 2 M.L.J. (S.C.) 60: (1966) 3 S.C.R. 400: A.I.R. 1966 S.C. 1300.
2. (1974) 3 S.C.R. 1109; A.I.R. 1974 S.C. 1066.

facts of the present case where there is no award of the arbitrators and all the assets of the dissolved firm had not been transferred to one of the partners on payment of any money to the share of the other partner or his representative. A Full Bench of the Andhra Pradesh High Court expressed the following view in *A. Narayanappa* v. *B. Krishtappa*[1]:

"In determining whether transfers of shares of partnerships which hold immovable property among other assets, require registration the Court must be influenced by the policy of the Partnership Act. The legal conception of the share of a partner in a partnership cannot be assessed in our opinion by reference to the possibility of his getting a share in the immovable property possessed by the partnership, for his getting a share in the immovable property is only an uncertain factor ....The interest in a partnership asset cannot be regarded as a right or interest in immovable property within the meaning section 17 (1) (*b*) of the Registration Act."

After the expression of this view by the Full Bench, the learned Judge who disposed of the Second Appeal observed:

"The Full Bench has held that the interest of a partner in partnership assets cannot be regarded as a right or interest in immovble property within the meaning of section 17 (1) (*b*) of the Registration Act. It follows that in so far as there is a relinquishment of their interest in the suit firm by the plaintiffs and defendants 10 to 12 who executed Exhibit B-18, the document does not rquire registration."

In *Narayanappa* v. *Bhaskara Krishnappa*[2] which arose out of that decision the Supreme Court has observed:

'While it is true that the position so far as third persons are concerned would be different it may be pointed out that in *Forbes* v. *Steven*[1] James V.C. has, as quoted by the learned Judge, said: It has long been the settled law of this Court that real estate bought or acquired by a partnership for partnership purposes (in the absence of some controlling agreement or direction to the contrary) is, as between the partners and as between the heirs of a deceased partner and his executors or administrator his personal property, and devolve and is distributable and applicable as personal estate and as legal assets"

In the subsequent decision in *Commissioner of Income-tax, West Bengal, Calcutta* v. *Juggilal Kamalapet*[2] the Supreme Court has observed:

"The deed of relinquishment in this case was in respect of the individual interest of the three Singhania brothers in the assets of the partnership, a firm in favour of the Kamala Town Trust and consequently, did not require registration, even though the assets of the partnership firm included immovable property, and was valid without registration. As a result of this deed, all the assets of the partnership vested in the new partners of the firm."

14. The partition of the partnership assets of the dissolved firm in the present case was between P.W. 1, a partner, and D.W. 1, the representative of a deceased partner, and not between a partner and any third party; section 22 of the Partnership Act would, therefore, apply. The aforesaid two decisions of the Supreme Court, as well as the opinion of the Full Bench of Andhra Pradesh High Court, referred to above, lay down that in such a case the record evidencing the division of the assets of the firm cannot be treated as relating to immovable properties even if they concerned such properties but must be regarded as personal estate and as legal assets. Therefore, I agree with the learned counsel for the appellant that

1. (1959) 1 An. W.R. 300: A.I.R. 1959 A.P. 380.
2. (1966) 2 S.C.J. 490: A.I.R. 1966 S.C. 1300.

1. (1870) 10 Eq. 178.
2. (1967) 1 I.T.J. 142: 63 I.T.R. 292: (1967) 1 S.C.J. 177: (1967) 1 S.C.R. 784: A.I.R. 1967 S.C. 401.

Exhibit A-1 is a record showing the division of the assets of a dissolved firm and that section 22 of the Partnership Act applies and that it does not require registration.

15. The appellant had not raised this point in her original memorandum of grounds of second appeal and had therefore filed C.M.P. No. 493 of 1976. The point raised in this additional ground is one of law and can be raised at any time. The petition is, therefore, allowed.

16. The learned counsel for the respondent submitted that Exhibit A-1 can be construed even as a deed of partition and has to be stamped as such, having regard to section 6 of the Indian Stamp Act and that since objection had been taken to the admissibility of that document in evidence, it could not be admitted for want of stamp. Section 6 of the Indian Stamp Act reads thus:

> "Subject to the provisions of the last preceding section, an instrument so framed as to come within two or more of the descriptions in Schedule I, shall, where the duties chargeable thereunder are different, be chargeable only with the highest of such duties;
>
> Provided that nothing in this Act contained shall render chargeable with duty exceeding *four rupees fifty-nine paise*, a counterpart or duplicate of any instrument chargeable with duty and in respect of which the proper duty has been paid".

The learned Subordinate Judge has, no doubt stated in paragraph 7 of his judgment that exception was taken to the admission of Exhibit A-1 in evidence on the ground that it was a partition-deed or an award and was inadmissible in evidence for want of stamp and registration. The record shows that Exhibit A-1 had, however, been admitted in evidence, and the learned Subordinate Judge, who had admitted it in the evidence subject to the question of its admissibility being considered later, has considered only the question of its inadmissibility in evidence for want of registration. The learned Additional District Judge has erred in thinking that the trial Court had admitted Exhibit A-1 subject to the determination of the question of its admissibility for want of stamp. The Privy Counil has observed in *Gopal Das* v. *Sri Thakurji.*[1]

> "The endorsement 'admitted against the plaintiff is in the form generally employed by the trial Judge under order 13, rule 4, for documents tendered by the defendant's just as the plaintiff's documents are marked 'admitted against the defendant'. The endorsement means that the document is admitted in evidence as proved. Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof. A strictly formal proof might or might not have been forthcoming had it been insisted on at the trial."

The respondent had not insisted on Exhibit A-1 being admitted in evidence subject to the question of its admissibility for want of stamp and registration being considered subsequently by the trial Court and she cannot, therefore complain about its admissibility for want of stamp even if it requires any stamp. The Supreme Court has observed in *Kashinathsa* v. *Narasingasa*[2], referred to above, that "the documents were admitted in evidence by the trial Court and no question of admissibillity of those documents can be raised at a later stage of the suit, or in appeal'. Section 36 of the Stamp Act lays down:

> "Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage

1. (1943) 2 M.L.J. 51: 56 L.W. 593: A.I.R. 1943 P.C. 83.

2. (1962) 2 S.C.J. 597: A.I.R. 1961 S.C 1077.

of the same suit or proceeding on the ground that the instrument has not been duly stamped."

Section 61 provides for revision by the appellate Court of certain decisions of Court regarding the sufficiency of stamps, of its own motion or on the application of the Collector. Therefore, I agree with the learned counsel for the appellant that it is not open to the respondent to contend at this stage that Exhibit A-1 is inadmissible in evidence for want of stamp, even if it required any stamp, as it has already been admitted in evidence by the trial Court.

17. There is evidence to show that O. S. No. 59 of 1961 had been filed by D.W. 1 aganist P.W. 1 and another for the inclusion of his name as a sharer in "N. M. T. Transports' on the basis of an agreement dated, 1st December, 1957. Exhibit A-1 had not been produced in that suit and P. W. 1 had denied the existence of any agreement, dated 1st December, 1957 between them. Now P. W. 1 has admitted that there is no other agreement, dated 1st December, 1957 besides Exhibit A-1. The learned Additional District Judge had, therefore, inferred that the agreement, dated 1st December, 1957 involved in O. S. No. 59 of 1961 must be only Exhibit A-1, and he has observed in paragraph 6 of his judgment that it is no more open to P. W. 1 to rest any claim on the foot of the transaction evidenced by Exhibit A-1. The respondent had not raised any plea of *res judicata* or estoppel as regards Exhibit A-1 in her written statement. Therefore, the learned counsel for the appellant relied upon the decision of the Privy Council in *Pir Sidik Mahomad Shah* v. *Musammat Saran*[1], and that of the Supreme Court in *Bhagat Singh* v. *Jagwant Singh*[2], in which the said decision of the Privy Council is referred to, and submitted that the learned Additional District Judge ought not to have gone into that question. The Privy Council has observed in that decision that "no amount of evidence could be looked into upon a plea which was never put forward" and following it, the Supreme Court has observed that "where a claim has never been made in the defence, no amount of evidence can be looked into upon a plea which was never put forward". Therefore, I agree with the learned counsel for the appellant and hold that it was not open to the learned Additional District Judge to go into the question and hold that it is no more open to P. W. 1 to rest any claim on Exhibit A-1.

18. For the reasons mentioned above, I agree with the learned Subordinate Judge that Exhibit A-1 does not require registration, though for another reason, and that the appellant has title to the suit property and was in possession. thereof on the date of the suit and is entitled to the declaration and injunction The second appeal, is therefore, allowed with costs throughout. No leave.

S. J. ——— *Appeal allowed.*

1. 121 I.C. 204: (1930) 58 M.L.J. 7 (P.C.) A.I.R. 1930 P.C. 57 (1).
2. (1962) 1 S.C.J. 162: A.I.R. 1966 S.C. 1861

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Suryamurthy, J.*

A. Syed Amir and another .. *Petitioners**

v.

Shanmughasundara Mudaliar .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (*a*)—*Non-residential building—Petition for eviction of tenants for owner's use and occupation, and for demolition, and re-construction—Petition found* bona fide—*Notice under section* 106 *of Transfer of Property Act not necessary—Transfer of Property Act* (*IV of* 1882), *section* 106

The landlord filed a petition for eviction of tenants on the ground that the building was required for his own use and occupation after demolition and reconstruction. He had no other non residential building and he had sufficient means and had obtained sanction to rebuild. The landlord succeeded before

*C. R. P. Nos. 95 and 96 of 1976.

7th April, 1976.

the Rent Controller and before the Appellate Authority. On revision,

Held: The fact that the landlord was conducting a business in cloth in a building which he had taken on rent and owned no other non-residential building was sufficient to justify the conclusion that he *bona fide* required the building for his own use. The Courts below were perfectly right in coming to the conclusion that the landlord required the building for demolition and reconstruction.

[*Paras*. 2 *and* 3.]

The special procedure provided by the Tamil Nadu Buildings (Lease and Rent Control) Act had displaced the requirements of the procedure for eviction under the Transfer of Property Act. Therefore a notice terminating the tenancy in accordance with the provisions of section 106 of the Transfer of Property Act, was not necessary. [*Para*. 5.]

Cases referred to:—

Raval and Company v. *K. G. Ramachandran*. (1974) 2 S.C.R. 629: A.I.R. 1974 S.C. 818; *P J. Gupta and Company* v. *K. Venkatesan, Merchant*, (1975) 1 S C.C. 46. A.I.R. 1974 S.C. 2331; *Sukumaran Nair* v. *Neelakantan Nair*, (C.R.P. No. 3868 of 1974) etc., (1976) T.L N. J. 110.

Petitions under section 25 of Act XVIII of 1960 as amended by Act XXIII of 1973 praying the High Court to revise the order of the Appellate Authority, Court of the Principal Subordinate Judge, Tiruchirapalli, dated 10th October, 1975 and made in C M.A. Nos. 117 of 1974 and 118 of 1974 respectively (H.R.C.O.P. Nos. 235 and 233 of 1973 on the file of the Rent Controller III Additional D.M.C., Tiruchirapalli, respectively.

S. Syed Ismail, for Petitioners.

N. Sankaravadivel, for Respondent.

The Court delivered the following

JUDGMENT:—Shanmughasundara Mudaliar, the respondent in these two revision petitions, who purchased the premises in dispute for a consideration of Rs. 30,000 filed three H.R.C.O.Ps to evict therefrom the tenants, who were in occupation of different parts of the building, alleging *inter alia* that he required the building for his own use and occupation as well as for demolition and reconstruction. The tenants contended *inter alia* that the buildings were not required for demolition and reconstruction or for the landlord's own use and occupation and that there was no valid notice to quit. By a common order in all the three petitions, the learned Rent Controller held that valid notices to quit had been given to the tenants, that the landlord required the premises *bona fide* for his own use and occupation after demolition and reconstruction and that the tenants are liable to be evicted. He, therefore, allowed all the three petitions and ordered eviction of the tenants granting one month's time for each of them to vacate. Madavajee Lalji, one of the tenants, whose eviction was ordered, does not appear to have filed any appeal against the order of the learned Rent Controller A. Syed Amir and C.N. Surendran, the civil revision petitioners before this Court, preferred C.M.A. No. 117 of 1974 and C.M.A. No. 118 of 1974 before the Appellate Authority against the orders of the learned Rent Controller. The learned Appellate Authority confirmed the orders of the learned Rent Controller and dismissed the appeals.

2. In these civil revision petitions, it is contended that there was no valid notice to quit and that the landlord does not *bona fide* require the premises either for his own use and occupation or for demolition and reconstruction. The landlord is now carrying on a business in cloth in the Big Bazaar Street, Tiruchirapalli, in premises which he has taken on rent. He owns no other non-residential building within the limits of Tiruchirapalli Municipality. He purchased the building in question for a consideration of Rs. 30,000. The learned counsel for the civil revision petitioners contends that the landlord has purchased the premises in dispute only as an investment and not for his own use and occupation. This contention is preposterous. By investing a sum of Rs. 30,000 in the business which he is already conducting, the landlord would earn more profits than he

would ever be able to get by way of rent from the building. The tenants have no right to tell the landlord whether he should treat the purchase as an investment or use the building for his own business. P.W. 1, the landlord, has spoken to the fact that he purchased the building for carrying on his own business therein. There is absolutely no reason to disbelieve his evidence. The very fact that he is conducting a business in cloth in a building which he has taken on rent and owns no other non-residential building is sufficient to come to the conclusion that he *bona fide* requires the building for his own use.

3. The building in question is an old type of building without any show-room. The landlord has sufficient means to reconstruct the building after demolishing the existing building. He has applied to the Municipality for a licence to reconstruct the building. He has also furnished a blueprint to the Municipality. He has obtained sanction to rebuild. The blueprint submitted by him to the Municipality has been duly approved. Therefore, the Courts below were perfectly right in coming to the conclusion that the landlodrd *bona fide* required the building for demolition and reconstruction.

4. A notice to each of the tenants terminating the respective tenancies expiring with the end of the month of the tenancy has been given. The contention of the tenants before the Courts below was that the tenancy was not from month to month, but from the 15th of every month to the 15th of the succeeding month as the landlord purchased the building on 15th February, 1973, and that consequently a notice proceeding on the basis that the tenancy was from 15th of every month to 15th of the next month should have been given. This contention is factually incorrect, because after the landlord purchased the building, the rent for 15 days with effect from 15th February, 1973 was paid by each of the tenants and thereafter the rent was paid from month to month treating the tenancy as commencing from the 1st of every month. Hence, a valid notice to quit in accordance with the provisions of section 106 of the Transfer of Property Act has been given to each of the tenants.

5. Even assuming that there was no valid notice in quit, the landlord is entitled to maintain the petition for eviction in view of the ratio in *Raval and Company* v *K.G. Ramachandran*[1] and *P. J. Gupta and Company* v. *K. Venkatesan, Merchant*[2] which have been followed by Ramaprasada Rao J., in *Sukumaran Nair* v. *Neelakantan Nair*[3]. The special procedure provided by the Tamil Nadu Buildings (Lease and Rent Control) Act has displaced the requirements of the procedure for eviction under the Transfer of Property Act. Therefore a notice terminating the tenancy in accordance with the provisions of section 106 of the Transfer of Property Act is not necessary.

6. Hence, the orders of the Courts below are confirmed, and these revision petitions are dismissed. There will be no order as to costs. Time for eviction three months.

S. J. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Ramasamy Moopanar . *Appellant**

v.

Rathnammal and others... *Respondents.*

Injunction—Suit for injunction on basis of possession—Competent—Question of title not relevant.

Where the suit is for injunction based on possession the plaintiff need not prove title. The question of title is not relevant for the purpose of considering the eligibility for injunction prayed for by

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1. (1974) 2 S.C.R. 629: A.I.R. 1974 S.C. 818.

2. (1975) 1 S.C.C. 46: A.I.R. 1974 S.C. 2331.

3. (C.R.P. No 3868 of 1974) etc., (1976) T.L.N.J. 110.

*S.A. No. 143 of 1973. 26th September, 1975.

the plaintiff. The plaintiff is entitled to injunction on the basis of his possession. [*Para.* 5.]

Cases referred to:—

Govindaraj v. *Kandasamy Gounder*, (1956) 2 M.L.J. 578: 69 L.W. 977: I.L.R. (1957) Mad. 1245: A.I.R. 1957 Mad. 186; *Chayalier, I.I. Iyyappan and another* v. *The Dharmodayam Company*, (1963) 1 S.C.R. 85; *N.S.S. Ltd.* v. *K.C. Alexander*, 1968 (1969) 1 S.C.J. 455: (1968) 3 S.C.R. 163: A.I.R. S.C. 1165; *Yeshwant Singh* v. *Jagdish Singh*, (1968) 2 S.C.J. 244: (1968) 2 S.C.R. 203: A.I.R. 1968 S.C. 620; *Raghubir Saran and others* v. *Param Kirti Saran*, A.I.R. 1962 All. 444.

Appeal against the decree of the Court of the Subordinate Judge, Ramanathapuram, in Appeal Suit No. 64 of 1971 preferred against the decree of the Court of the District Munsif of Sathur in Original Suit No. 610 of 1969.

S. Gopalaratnam, for Appellant.

P.N. Venugopalan, T. Thirumalraj and *R. Thiagarajan*, for Respondents.

The Court delivered the following

JUDGMENT.—The defendant is the appellant. The plaintiff, who is running an elementary school on the suit property, filed a suit against the defendant for an injunction restraining him from interfering with his possession and enjoyment. The site, on which there is said to be a school building, was classified as Government poramboke or natham land. The plaintiff claimed that he and his predecessor-in-title had been in occupation for over 70 years. The defence was that the suit property belonged to the defendant and that under a licence granted by his father, the plaintiff was running the school in the property. The defendant relied on a partition of 1918, in which this property was dealt with by his family. The defendant's case was that the plaintiff was not entitled to the relief claimed.

2. The trial Court took the view that neither the plaintiff nor the defendant had established title to the suit property. It, however, granted an injunction, as the plaintiff was in possession. The learned Subordinate Judge, to whom the respondent appealed, held, on the basis of Exhibits B-3 to B-7, a partition-deed and certain other sale-deeds, in which in the description of boundaries, the present property was referred to as the defendant's property, that the predecessor-in-title of the defendant had dealt with the suit property as their own, though it was natham land. He also held, on the basis of possession, that the suit for an injunction had to be decreed. Hence the present second appeal by the defendant.

3. The learned counsel for the appellant, who lost in both the Courts, submitted that the learned appellate judge having found that the appellant and his prodecessor-in-title had treated the property as their own, should not have granted an injunction in favour of the plaintiff who had no title to the suit property. He further contended that the plaintiff was in the position of a trespasser on his own showing and that a trespasser could not seek to hold his possession against the lawful owner. For the respondent, the submission was that the defendant had filed a title suit subsquently in which the question of title would have to be gone into. He, therefore, submitted that the lower Courts did not act wrongly in granting the injunction, so that the injunction, could continue till the disposal of the title suit.

4. The learned counsel for the appellant brought to my notice the decision in *Govindaraj* v. *Kandasamy Goundar*[1]. It is to support the proposition that the plaintiff cannot change his case and rely on the defendant's stand. In the present case, I am not satisfied that the plaintiff is trying to change his case. The plaintiff relies on his own possession for the purpose of getting the relief of injunction. I am, therefore, not satisfied that the decision in *Govindaraj* v. *Kandasamy Goundar*[1] has any application.

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1. (1956) 2 M.L.J. 578: 69 L.W. 977: (1957) I.L.R. Mad. 1245: A.I.R. 1957 Mad. 186.

5. The learned counsel then submitted that a party cannot change his case in appeal. This has reference to the reliance on the licence, pleaded by the defendant, in support of the plaintiff's right of injunction. For this purpose counsel relied on a decision of the Supreme Court in *Chayalier, I.I. Iyyappon andanother* v. *The Dharmodayam Company*[1]. The relevant passage occurs at page 94. Kapur, J., pointed out that it was not open to a party to change his case at the appellate stage. Here also, I am not satisfied that the plaintiff is trying to change his case at this stage. No doubt, he relies on the permission that was granted by the father of the defendant. This is only as a kind of shield to support his case of possession. In a case like this where the suit is for an injunction based on possession, it has been held by the Supreme Court in *N.S.S. Ltd.* v. *K.C. Alexandar*[2] and also in *Yeshwant Singh* v. *Jagdish Singh*[3] that the plaintiff need not prove title. Therefore the question of title is not relevant for the purpose of considering the eligibility for the injunction prayed for by the plaintiff. In view of the fact that the question of title is in issue in a different suit, which has been subsequently filed, I do not think it proper to go into it because the matter may be gone into fully in that suit. I, therefore, hold that the plaintiff is entitled to the injunction on the basis of his possession, and nothing said in the present proceeding would prejudice the rights of either parties with reference to the question of title in issue in the pending suit.

6. Learned counsel for the respondent relied on the provisions of section 60 of the Easements Act and also on the decision in *Raghubir Saran and others* v. *Param Kirti Saran*[4] to show that in the present case the plaintiff had put up construction on the property and that the licence cannot be revoked unilaterally by the defendant. But, as pointed out by the learned counsel for the appellant, the question as to whether the plaintiff has put up any structure over the property is not clear. In these circumstances, I do not think it necessary to go into the question of applicability of section 60 of the Easements Act or the decision in *Raghubir Saran and others* v. *Param Kirti Saran*[1]. As the plaintiff is entitled to the injunction and has been properly granted by both the Courts below, I do not think it proper to interfere with the said decision. Subject to the above, the appeal is dismissed. I may reiterate that nothing said here will prejudice the rights of parties in the title-suit. There will be no order as to costs. No leave.

1. (1963) 1 S.C.R. 85.
2. (1969) 1 S.C.J. 455: 1968 S.C.R. 163: A.I.R. 1968 S.C. 1165.
3. (1968) 2 S.C.J. 244: (1968) 2 S.C.R. 203: A.I.R. 1968 S.C. 620.
4. A.I.R. 1962 All. 444.

R.S. — — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Chandrappa Govinda Mudali .. *Appellant**

v.

Govindaswami Mudaliar .. *Respondent.*

Execution—Attachment of suit property in October, 1960—*Court auction-sale-in* 1964—*Defendant purchasing—Possession delivered to defendant in January,* 1965—*Conveyance of suit property long before in* 1956 *with obligation to reconvey on payment within* 5 *years—Period not expired at time of attachment—Plaintiff advancing money to obtain reconveyance—Reconveyance obtained—Plaintiff purchasing the property in* 1962—*Rights of parties.*

A Court has no jurisdiction to sell a third party's property. It was not necessary for the plaintiff in the instant case to intervene in the execution proceedings, which led to the court-auction-sale and make a claim or take other proceedings under Order 21 of the Civil Procedure Code He could collaterally challenge the sale as a nullity which he had done. As the person, whose property was sought to be attached had no saleable interest in the property at the time of the attach-

1. A.I.R. 1962 All. 444.

*S.A. No. 139 of 1973. 26*th September,* 1975.

ment there is no question of the proceedings giving any benefit to the defendant. [*Para.* 5.]

Case referred to:—

Khiarajmal v. *Daim* (1905) I.L.R. 32 Cal. 296 (P.C.): 32 I.A. 23: 9 Cal. W.N. 201.

Appeal against the Decree of the Court of the Subordinate Judge, Chingleput in Appeal Suit No. 361 of 1966 preferred against the decree of the Court of the District Munsif of Tiruttani in Original Suit No. 22 of 1965.

M. V. Krishnan, for Appellant.

T. K. Seshadri, for Respondent.

The Court delivered the following

JUDGMENT.—The defendant is the Appellant. The plaintiff laid the suit for declaration of his absolute title to the suit property measuring 2 acres out of 3.17 acres comprised in survey No. 164 of Pettai Kandigai Village, Tiruttani Taluk, or for his possessory title to the above property and for a permanent injunction against the defendant or in the alternative for possession of the property. According to the plaintiff the suit property belonged to one Lingappa, who was in possession and enjoyment thereof. On 12th October, 1956, Lingappa sold the property to one Kuttiappa Mudali for a sum of Rs. 300 with an obligation to reconvey the property on receipt of Rs. 300 within five years from the date of the sale-deed. Thus, the right of reconveyance of the property was available till 11th October, 1961. As Lingappa had no money to get back the property, the plaintiff paid Lingappa the sum of Rs. 300 so as to enable him to take back the said property. Lingappa got back the property. He had agreed to sell the said property for Rs. 3,000 to the plaintiff. The sum of Rs. 3,000 was paid as follows: Rs. 300 in the manner mentioned above, Rs. 1,600 went towards discharge of certain debts and Rs. 1,100 was payable before the Sub-Registrar. The plaintiff could not make the balance of the amount of Rs. 1,100 and, therefore, he could not get the conveyance till 24th August, 1962. When he paid the balance of the amount of Rs. 1,100 a sale-deed was executed in his favour on that date and it was registered. According to the plaintiff he had thus become the full owner of the suit property. On 6th February, 1965 the defendant is said to have come to the suit property with a number of coolies and attempted to harvest the crops. According to the plaintiff, the defendant thus disturbed his possession and, therefore, he came forward with the present suit.

2. The defendant resisted the above claim of the plaintiff on the ground that it is false to say that Kuttiappa Mudali was put in possession of the suit property by virtue of the sale-deed in his favour, dated 12th October, 1956, and that the suit land was always in the possession and enjoyment of Lingappa Chetty till 18th January, 1965, when the defendant took possession of the same with standing crops therein, through Court. According to him there was a decree against Lingappa in O.S.No. 117 of 1960 and the property here was brought to sale. The defendant purchased the said property in court-auction on 13th March, 1964 and he took delivery thereof on 18th January, 1965. The defendant submitted that the property had already been attached on 23rd October, 1960 and that the sale-deed in favour of the plaintiff was void and inoperative. As no claim had been preferred by anybody then or after the property was sold in court-auction, it was contended that the plaintiff could no longer set up any title and that he was not entitled to the suit property. The defendant prayed, therefore, that the suit may be dismissed with costs.

3. The learned District Munsif held that the plaintiff was not entitled to the declaration and the permanent injunction prayed for by him, that the sale-deed in favour of the plaintiff was not true and valid and supported by consideration and that the suit was not maintainable. Aggrieved by that decision the plaintiff preferred an appeal to the learned Subordinate Judge of Chingleput. The appeal was allowed. There was a second appeal *viz.*, S.A. No. 95 of 1969 in which the High Court remitted the matter to the lower Appellate Court and on the second occasion the learned Subordinate Judge again allowed the appeal. He held that the plaintiff was entitled to the declaration and the injunction. He was

convinced that the plaintiff alone was in possession of the suit land on the date of the suit and as such he was entitled to the injunction as prayed for.

4. In the present appeal two points are raised for consideration. The first is whether as a result of the purchase of the suit property in court-auction by the defendant, he had become the complete owner thereof. The court-auction in execution of the decree against Lingappa, it may be remembered, was in pursuance of an earlier attachment on 23rd October, 1960. The attachment would be operative if it was Lingappa's property on that date. But the property had become Lingappa's only on 24th October, 1960. On the date on which the attachment was made Lingappa had no attachable interest in the property. Though he had entered into an agreement for conveyance of the property, he had not actually taken over a conveyance so as to become the owner. The attachment was not of the interest of Lingappa in the said property. It is true that the saleable interest of Lingappa could have been attached, but it was not. Therefore, on the facts herein, on the date of the attachment, since Lingappa had no interest in the property, the attachment is invalid. The subsequent sale by Court does not confer any title on the defendant. The fact that Lingappa got the property later does not in any manner help the appellant herein, because unless the attachment was made of a property belonging to Lingappa and sale thereof, there could have been no transfer to the defendant so that the purchaser can derive title thereby.

5. The next question that was argued was whether the sale by court-auction could be treated as nullity by the plaintiff. In other words, the point raised was whether the plaintiff, not having taken proper proceedings for the purpose of setting aside the court-sale, is not bound by the Court proceedings. In this connection, my attention was drawn to a decision of the Privy Council in *Khiarajmal* v. *Daim*[1]. In that case the lands in suit were held by the plaintiffs under leases granted by Government for terms of seven years, and renewed from time to time. To a suit brought in 1897 for redemption of the lands which had been mortgaged in 1878 by usufructuary mortgages, the defence was that the defendants were not mortgagees of the property but had purchased it at sales in execution of decree in 1880-81 which could not be set aside, and that the suit was barred by lapse of time. The Privy Council held that though the sales could not now be set aside or treated as void by reason of mere irregularities of procedure in obtaining the decrees or in execution of them, yet the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record and that as against such persons the decrees or sales under them were void without any proceedings to set them aside. Applying the clear principle laid down by the Privy Council, the Court had no jurisdiction to sell a third party's property. There is no need on the facts herein for the plaintiff herein for setting aside the court-auction-sale. It is not necessary for him to intervene in the execution proceedings, which led to the court-auction-sale and make a claim or take other proceedings under Order 21 of the C.P. Code. He could collaterally challenge the sale as a nullity which he has done before. As the person whose property was sought to be attached, had no saleable interest in the property, there is no question of the proceedings giving any benefit to the defendant. In these circumstances, there is no merit in the appeal. The second appeal is dismissed, with costs. No leave.

R. S. —— *Appeal dismissed.*

1. (1905) I.L.R. 32 Cal. 296; 32 I.A. 23.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*V. Ramaswami, J.*

B. Gopalaswamy .. *Petitioner.**

v.

The Union Territory of Pondicherry, represented by Chief Secretary to Government of Pondicherry, Pondicherry and another

... *Respondents.*

Constitution of India (1950), Article 311—Petitioner temporarily appointed as section Officer—Appointment confirmed—Petitioner passed departmental test—Could not pass the L.C.E. examination—Services terminated—Termination order liable to be set aside.

Where it is not a case of the appointment of the petitioner as a section-officer in the Public Works Departement being made subject to the appointee qualifying himself as a diploma-holder in the L.C.E. course and even the confirmation order did not require him to so qualify himself, the Government was not entitled to require any further qualifications to be acquired subsequent to the appointment and confirmation and on the petitioner's failure to do so to terminate his services. Termination, on the failure to comply with such a superimposed condition, will certainly amount to punishment attracting the provisions of Article 311 of the Constitution of India. The order of the Government is liable to be set aside.

[*Para.* 6.]

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records of the 2nd Respondent in No.5494/TP/Div/EC1/70. dated 28-11-1973 and consequential order No. 5494/T.P/Div/O.S./EC.2/71, dated 1st November, 1974 and quash the same.

J.Stanislas, for Petitioner.

C.Krishnan, The Government Pleader for Pondicherry, for Respondents.

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*W.P. No. 4110 of 1974.

12th January, 1976.

The Court made the following

ORDER:—This is a petition under Article 226 of the Constitution of India praying for the issue of a writ of *certiorari* to quash the order of the second respondent dated 1st November, 1974 by which the services of the petitioner as section officer (redesignated as Junior Engineer) were terminated with effect from 28th November, 1974.

2. The post of a section officer in the Public Works Department of the Union Territory of Pondicherry is a class III post and is filled either by promotion from among the categories of Draftsman Grades I and II who had practical experience of not less than three years in Public Works Department or by direct recruitment.

3. By an advertisement in the English dailies, dated 15th May, 1958, applications were called for, for the appointment of a section officer. The petitioner, who had appeared for the examination in the diploma course in L.C.E. and who was awaiting the results of the examination, applied for the post and he was called for an interview on the 1st of August, 1958 and was selected for post of a section officer and posted to Karaikal sub-division in the leave vacancy of one Sri Andre on a pay of Rs. 100 per month in the scale of pay at Rs. 100 5-150-10-250 plus dearness allowance of Rs. 36 and house-rent allowance of Rs. 3. It was mentioned in his appointment order that the appointment was purely temporary and was subject to termination on two month's notice. When the posts of section officer were made permanent, by a confirmation order, dated 17th May, 1965, the appointment of the petitioner was confirmed as section officer with effect from 1st April, 1964. This confirmation was subject to the petitioner passing the prescribed tests. There is no dispute that the petitioner had passed the prescribed departmental tests. It appears that at the time of selection, in the publication issued in the papers themselves the minimum qualification required for selection as a section officer was the diploma in L.C.E., or equivalent qualification. Finding that the petitioner did not possess the minimum qualification the Government issued a memo. dated 23th May, 1967, by which they informed the petitioner that in view of the fact that he did not possess the

minimum educational qualifications but had put in more than eight years of service, the Government had decided to give the petitioner an opportunity to qualify himself for the post by passing the L.C.E. Examination in full within one year from the date of the issue of the said memo. failing which his services would be terminated. It may be mentioned here that the petitioner had passed all the subjects except one in the L.C.E. Course. The petitioner tried to appear for the one subject in which he had failed ; but by that time, the syllabi for the L.C.E. Course had been changed and therefore, he was asked by the Education Department to attend an institution for at least two years and then he would be permitted to write the examination in order that he may be given the diploma in L.C.E. Since the petitioner found it not possible to complete the course, he was going on requesting the Government to exempt him from the minimum educational qualifications. Ultimately, since the petitioner was not in a position to complete the L.C.E. course, the Government issued a further memo, dated 28th November, 1973, stating that that was the final notice requiring the petitioner to acquire the minimum educational qualification within a period of one year failing which his services would be terminated. Since the petitioner had not qualified himself for a diploma in L.C.E. within the period of one year, by the impugned memo., dated 1st November, 1974, his services were terminated with effect from 28th November, 1974. It is to quash this order, the present writ petition has been filed.

4. The learned counsel for the petitioner contended that even if, at the time of appointment, the minimum educational qualification required was a diploma in L.C.E., he was appointed as a Section Officer by the order of the Government, dated 5th August, 1958 without any condition as to his acquiring a pass in the L.C.E. Diploma course. But, on the other hand, when the temporary posts of Section Officer were made permanent, the petitioner was confirmed as a Section Officer with effect from 1st of April, 1964. Even in that confirmation order, there was no condition that he should appear for an examination or pass the Diploma course in L.C.E. On the other hand, even the seniorities were fixed on the basis that he was fully qualified for appointment as a Section Officer. Therefore, the subsequent direction of the Government requiring him to pass the examination in L.C.E., is illegal and beyond the jurisdiction of the respondents. He further contended that the petitioner's service could not be terminated on the ground that he is not possessed of the minimum educational qualification prescribed for the post of a Section Officer. The learned counsel is well founded in his contentions.

5. It is true, as contended by the learned counsel for the respondents that even in the Press notification calling for applications for the post of Section Officers, it was stated "that persons holding at least L.C.E., or equivalent diploma or those who have appeared for the B.E. Examination need only apply." But when the petitioner applied without a full pass in the L.C.E. Course, though the Government could have rejected his application did not choose to reject it. But, on the other hand, they appointed him as a Section Officer. It was pointed out in the counter-affidavit that it appears that the Director of Public Works at the time of forwarding the list of selected candidates in calling for interview from out of the total applications, by mistake shown against the name of one V. Gopalaswamy the qualification as having passed the L.C.E., Madras and that because of this mistake, later on, without noting that the petitioner had actually not passed the L.C.E. Examination and the initial of Gopalaswamy given in the report of the Director of Public Works differed from the initial of the petitioner, appointed the petitioner as if the petitioner was qualified for the post. It might be that in the report of the Director of Public Works, a mistake could have been committed in both giving the initial of the petitioner and also in stating that he had passed the L.C.E. Examination, Madras. But it was never the case of the department that either in the application for the post of or at any stage the petitioner gave any misstatement about his qualification. In fact the petitioner was not proceeded against for giving any false declaration either in the application or at any stage subsequent thereto on the basis of which he was selected to the post of Section Officer.

If the petitioner had disclosed his correct qualifications and did not mis-state either his qualifications or his initials, he could not be blamed because the selecting authority had selected him on a mistaken impression that he was a qualified candidate. I must also point out that there is no evidence also to show that the selecting authority has misunderstood the qualifications of the petitiouer at the time when he was recruited. It might be that there might not have been suitable candicates available and therefore the petitioner was selected even though he was not fully qualified. It is also seen from the letter of the Government dated 10th February, 1966, that some of the Section Officers in the Public Works Department had passed their final examination of the degree or diploma course after the date of appointment showing thereby that even those who were not fully qualified were appointed as Section Officers. But in the case of the petitioner, the original order of appointment and the confirming order did not require him to qualify himself as a diploma holder in L.C.E. course. It is therefore not possible for the Government, after he was confirmed in the service, to require him to qualify himself for the diploma in the L.C.E. course.

6. The learned Government Pleader contended that terminating the services of the petitioner on the ground that he had not fully qualified himself for the post will not amount to termination within the meaning of Article 311 of the Constitution of India. This is not a case where the appointment was made subject to his qualifying himself as a diploma-holder in L.C.E. Course. As already stated, even the confirmation order did not require him to qualify himself in the diploma of L.C.E. The Government, therefore, was not entitled to require any further qualifications to be acquired subsequent to the appointment and confirmation and on the failure of which to terminate the services. Termination, on the failure to comply with such a super-imposed condition, will certainly amount to punishment attracting the provisions of Article 311 of the Constitution of India. I am therefore of the opinion that the impugned order of the Government is liable to be set aside and it is accordingly set aside. The writ petition is allowed and the petitioner will be entitled to his costs. Counsel fee Rs. 250.

R. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT:—*V. Ramaswami, J.*

P. Vijayan .. *Petitioner**

v.

The Executive Officer, Avanashi Panchayat, Avanashi, Coimbatore District ... *Respondent.*

Panchayats and Committees of the Panchayat Proceedings, Rule 4—Meeting called for by Members—Notice—Purpose of meeting not specified—Date also not mentioned—Meeting invalid—Affixure of notice on outer door—Enough compliance with service of notice—Constitution of India, Article 226—Writ of prohibition issued.

Rule 4 (1) of the Rules relating to Proceedings of Panchayats and Committees of Panchayats shows that the purpose for which the meeting is to be held is to be specified in the notice requiring the same to be convened. Under rule 4 (2), before notice could be issued calling a meeting under that rule, at least five days should have lapsed after the notice issued under rule 4 (1). Since the notice itself in the instant case did not bear any date there was no knowing as to when exactly it was issued. The notice issued for the meeting called by the requisitionists under rule 4 (2) was also not in compliance with that provision.

[*Paras.* 6, 7 and 8]

Affixture of notice on the outer door of the home is enough compliance with service of notice.

[*Para.* 9]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the

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*W.P. No. 4206 of 1974.

11*th February*, 1976.

affidavit filed therewith the High Court will be pleased to issue a writ of prohibition restraining the respondent herein from giving effect to the resolutions said to have been passed at the so-called requisitioned meeting of the Avanashi Panchayat said to have taken place on 11th November, 1974, and give suitable directions in that behalf.

S. Jayaraman, for Petitioner.

M.A. Sadanand, for Respondent.

The Court made the following

ORDER:–The petitioner is the President of the Avanashi Panchayat which consists of fourteen members. On 31st October, 1974, nine of the members sent a written requisition to the petitioner to convene a meeting of the panchayat on 11th November, 1974 at 10-30 A.M. to consider the following subjects:

"(*a*) Sanction of income and expenditure account;

(*b*) To consider and and take steps to increase the revenue of the panchayat; and

(*c*) any other subject which may be brought up by the President or the Executive Officer."

This requisition was delivered by the requisitionists to the Executive Officer on 31st October, 1974. The Executive Officer says in his counter-affidavit that he gave it to the President on that very date. The petitioner further states that on 2nd November, 1974 he made an endorsement thereon to the effect that the date and the time for the meeting would be decided and communicated. But this is denied by the Executive Officer, and it is not necessary for me to go into that disputed question of fact as the writ petition could be decided on legal basis itself.

2. Finding that the petitioner had not called the meeting as required by the requisitionists, they sent a notice calling the meeting on 11th November, 1974 at 10-30 A.M., exercising their powers under Rule 4 (2) of the rules relating to Proceedings of Panchayats and Committees of Panchayats. The nine requisitionists attended the meeting on that date and passed as many as twenty resolutions and forwarded the same to the Executive Officer for giving effect to them.

3. On 12th November, 1974, the petitioner notified that a meeting of the panchayat would be convened at 10 A.M. on the 21st of November, 1974, for considering about sixteen items of business. The Executive Officer was directed by the petitioner to issue notices to the members for the above said meeting. But the Executive Officer refused to call the meeting stating that every one of the sixteen items of business which he had listed for the meeting, had already been considered by the nine requisitionists in the meeting held by them on 11th November, 1974 and that there was no need for a separate meeting therefor. Thereupon, the petitioner instructed the Executive Officer that none of the resolutions said to have been passed on 11th November, 1974 should be implemented by him on the ground that that meeting was one without jurisdiction and did not conform to the rules relating to panchayat meetings. When the Executive Officer did not heed to his directions, the petitioner filed this petition praying for the issue of a writ of prohibition directing the Executive Officer not to give effect to any of the resolutions passed on 11th November, 1974 by the nine requisitionists.

4. The petitioner has raised the following grounds, among others, in his affidavit in support of the writ petition:

Firstly, the notice issued by the requisitionists to convene the meeting did not specify the precise purpose for which the meeting was to be called. According to the petitioner, the third item put in the agenda is so vague that it could not form a subject for a meeting to be called by the Members under Rule 4.

Secondly, the notice issued by the requisitionists in exercise of the powers under Rule 4 (2) did not bear any date and it was not given in accordance with the rules.

Thirdly, no such notice, as required by rule 4 (2), was issued to the petitioner.

There are a number of other allegations, which need not be set out here, as I am satisfied that the petitioner is well-founded even on these three grounds, which entitle him to the writ of prohibition as prayed for.

5. The relevant rules are Rules 3 and 4, which may be extracted here:

"3 (1) No meeting shall be held unless notice of the day and time when meeting is to held and of the business to be transacted thereat has been given at least three clear days before the day of the meeting.

(2) In cases of urgency, the president may convene a meeting on giving shorter notice than that specified in sub-rule (1).

(3) The agenda for the meeting of the town panchayat shall be prepared by the executive officer in consultation with president. The executive officer may include in the agenda any subject which in his opinion, should be considered by the panchayat and shall include therein any subject specified by the president. On any subject included in the agenda, the president as well as the executive officer shall have the right of recording his views in a note and such note shall be circulated to the members or placed before the panchayat before or at the time of the consideration of such subject by the panchayat.

(4) The agenda for the meeting of a village panchayat shall be prepared by the president. The president may include in the agenda any subject which in his opinion should be considered by the panchayat. On any subject included in the agenda, the president shall have the right of recording his views in a note and such note shall be circulated to the members or placed before the panchayat before or at the time of the the consideration of such subject by the panchayat.

4 (1). The president shall, on the requisition in writing of not less than one-third of the members then on the panchayat, convene a meeting of the panchayat, provided that the requisition specifies the day (not being a day observed by the panchayat as a holiday), when and the purpose for which the meeting is to be held. The requisition shall be delivered at the office of the panchayat during office hours to the president, the executive officer or any other person who may be in charge of the office, at least ten clear days before the date of the meeting.

(2). If the president fails within forty-eight hours from the delivery of such requisition to call a meeting on the day specified therein or within three days thereafter, the meeting may be called by the members who signed the requisition on giving the notice provided for in sub-rule (1) of Rule 3 to the other members of the panchayat.

(3) No meeting under sub-rule (1) or sub-rule (2) shall be convened at any place other than the place, where the office of the panchayat in situated."

6. It may be seen from rule 4 (1) that the purpose for which the meeting is to be held is to be specified in the notice requiring the same to be convened. But, both the first subject mentioned in the agenda and the third subject are not specific but are vague. What 'income and expenditure' which the requisitionists wanted the panchayat to sanction are not mentioned there. Further, the meeting contemplated under rule 4 (1) being to consider specific subjects, the meeting could not consider any other subject which is not specified there. Relying on the blanket agenda covered by clause (*c*) of the requisitioning letter, the requisitionists seem to have passed twenty resolutions of varying nature. The notice calling a meeting itself is therefore not in compliance with Rule 4 (1). Therefore, the president was well within his jurisdiction in not calling for a meeting, though one would have expected him, to write to the requisitionists of the defects in the notice and asking them to rectify the same.

7. The notice issued by the requisitionists under Rule 4 (2) was also not in compliance with that provisions. That notice did not contain any date. It may be seen from Rule 4 (2) that before they could issue the notice calling a meeting under rule 4 (2), at least five days should have lapsed after the notice issued under section 4 (1). Since the notice itself did not bear any date there was no knowing as to when exactly this notice was issued.

8. Further, even if it is to be assumed that the notice was issued subsequent to the five days as required in Rule 4 (2), it could not be, with any definiteness, decided that there were three clear days from the date of notice before the meeting as required under Rule 3, which is extracted above The date of notice, in this case, is absolutely essential in order to find out whether it is in compliance with rule 3 and rule 4 (2). Except stating that one of the signatories to the requisition had signed in the notice with date "6th November, 1974" there was no definite statement on what date actually the notice was issued. The notice issued for the meeting called by the requisitionists under rule 4 (2) is, therefore, not in compliance with the provisions.

9. So far as service of the notice on the petitioner is concerned, the counter-affidavit states that when the notice was sent through a panchayat servant, the president was not available in the house and that when it was sought to be served on the adult members of the family they refused to receive the same and thereupon a copy of the notice was affixed on the outer door of the petitioner's house. Neither the counsel for the petitioner nor the counsel for the respondent could rely on any particular mode of service so far as meetings of panchayats are concerned, in the absence of specific rules relating to such service. I am satisfied that the affixture of notice on the outer door of the petitioner's house is enough compliance with service of notice.

10. But, here again, there is no averment in the counter-affidavit on what date the affixture was effected in order to find whether rule 3 had been complied with. Therefore, the petitioner is well-founded even in this contention, that there was no valid service of notice on the petitioner for the meeting called on 11th November, 1974.

11. These grounds themselves are enough to invalidate the entire proceedings held on 11th November, 1974, and the Executive Officer could not have acted on the resolutions on that occasion.

12. The writ petition is accordingly allowed and the rulenisi is made absolute. The petitioner will be entitled to his costs. Counsel's fee Rs. 150.

R.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan, J.*

Muthusamy Gounder ... *Petitioner**

v.

A. P. Kaithamalai Gounder ... *Respondent.*

(A) *Partition Act (IV of 1893)—Inherent power of Court to direct sale outside provisions of the Act.*

(B) *Civil Procedure Code (V of 1908), section 151—Partition suit—Court has no inherent power in partition suit to direct a sale outside the Partition Act.*

In a partition suit the lower Court directed the Commissioner to sell the property among the sharers after giving one month's notice to the counsels of both the parties and that the successful bidder among the sharers shall be permitted to set off his share of the sale price and deposit the balance. On revision,

Held: It is clear from the order passed by the lower Court, which was under Order 26, rules 13 and 14, Civil Procedure Code and section 151, Civil Procedure Code, that an auction was directed to be held among the sharers. Such a direction is outside the purview

*C.R.P. No. 2664 of 1975.

7th April, 1976

of the Partition Act. The discussion and the decision rendered in O.S.A. No. 108 of 1966 shows that the Court does not have inherent powers, apart from the Partition Act, to pass orders in respect of a partition suit. The Court below should not have ordered auction of the suit property as between the sharers. In the circumstances, the order of the Court below is set aside and the matter is remanded to the file of the lower Court for the purpose of disposal afresh in accordance with law. [*Paras.* 8 *and* 13]

Cases referred to:—

Nitya Gopal v. *Pran Krishna*, A.I.R. 1952 Cal. 893; *Ghadhar Ghose* v. *Janaki Nath Ghose*, A.I.R. 1969 Cal. 59; *R. Ramamurthi* v. *V. Rajeswara Rao*, (1973) 1 S.C.R. 904: A.I.R. 1973 S.C. 643; *Sampathammal* v. *Veerammal*, (1973) 86 L.W. 500 (1): (1973) 2 M.L.J. 192: A.I.R. 1974 Mad. 32; *Subbamma* v. *Veerayya*, (1932) 61 M.L.J. 552: 34 L.W. 730: 136 I.C. 203: A.I.R. 1932 Mad. 15; *Ramasamy Naicker* v. *Nagammal*, (1970) 83 L.W. 199; *Vasarambal* v. *Nataraja Chettiar*, (1975) T.N.L.J. 441; *Ramaprasada Rao* v. *Subbramaiah*, (1957) 2 An. W.R. 488: A.I.R. 1958 Andh. Pra. 647; *Ram Gopal* v. *Bhikamchand*, A.I.R. 1964 Raj. 229; *Shardaben Hirachand* v. *Chandrason*, I.L.R. (1966) Guj. 143; *Ram Prasad* v. *Mt. Mukandi*, A.I.R. 1929 All. 443.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Erode, dated 1st April, 1975, and made in I.A. No. 1236 of 1974 in O.S. No. 515 of 1971.

S. Gopalaratnam, for Petitioner.

M. R. Narayanaswami for *K. Sarvabhauman* and *S. Gopalaratnam*, for Respondent.

The Court made the following

ORDER:—The defendant in O.S. No. 515 of 1971 is the plaintiff herein. The respondent herein who is the plaintiff in O.S. No. 515 of 1971 filed in I.A. No. 1236 of 1974 under Order 26, rules 13 and 14 of the Code of Civil Procedure to appoint a Commissioner to divide the suit property in accordance with the preliminary decree and to pass a final decree. In the affidavit filed in support of the petition, the plaintiff-respondent herein wanted appointment of a Commissioner to divide the suit property which consists of a rice mill and an open space or to sell it in auction. The petitioner herein in the counter-statement filed for I.A. No. 1236 of 1974 *inter alia* contended that the suit property is easily divisible into two equal portions or at least approximately equal portions and as such there is no need to sell the suit property in auction.

2. The trial Court took up for determination as to whether the suit property can be conveniently divided into two equal shares by metes and bounds or whether the entire property has to be sold to the highest bidder and the proceeds divided among the sharers.

3. No doubt, the Commissioner has filed a report suggesting division of the property and adjustment as regards the money value thereof. The plaintiff-respondent herein filed objections to the Commissioner's report stating that the suit property is a rice mill with machineries like electric motor huller and also drying yard with godown constituting one unit, that the property is incapable of division, that the report of the Commissioner suggesting division of the suit property as though the suit property comprises only of immovable property is unsustainable in law and on facts and that the Commissioner has failed to note that it is impossible to enjoy the northern half without the southern half and *vice versa*. The respondent herein has further contended that the suit property has a good-will, that such good-will is not capable of estimation in money value and as such the Court may be pleased to order sale of the suit property inclusive of machineries, licences, permits, etc., between the parties to the suit and render justice.

4. The lower Court, after taking into consideration the Commissioner's report and the objections filed by the respondent herein, directed the Commissioner to sell the property among the sharers after giving one month's notice to the counsels of both the parties and the successful bidder among the sharers shall be

permitted to set off his share to the sale price and deposit the balance.

5. Aggrieved with the said order passed by the lower Court, the defendant has preferred this civil revision petition.

6. Mr. S. Gopalaratnam, the learned counsel, appearing for the petitioner contended that, as per the Commissioner's report the property can be divided by metes and bounds and that the lower Court had no authority in law to direct a sale under the circumstances of the present case. The learned counsel has also filed C.M.P. No. 13787 of 1975 under section 3 of the Partition Act and section 151, Civil Procedure Code, praying that this Court may be pleased to order a valuation of the plaintiff's share of the suit property described in the preliminary decree and offer to sell the same to the petitioner at such valuation. The main contention pressed by Mr. S. Gopalaratnam, the learned counsel, appearing for the petitioner is that the Court's powers are limited to the provisions of the Partition Act and that the Court cannot have any inherent jurisdiction apart from the said Act, According to the learned counsel, the direction by the Court below to the Commissioner to sell the property among the sharers is beyond the powers conferred upon the Court. As per section 2, the only power the Court has is to direct the sale of the property and distribute the proceeds thereof to the respective parties as per the provisions of section 2 of the Act. Instead, the learned counsel appearing for the petitioner states that the Court, without jurisdiction, directed the property to be sold in between the sharers. The learned counsel also read section 3 of the Partition Act and contended that the petitioner herein is entitled to file such an application to buy at a valuation the share of the party asking for a sale. In such a case, the Court shall fix the valuation of the share in such manner as it may think fit and offer to sell the same to the person applying under section 3 of the Act at a price so ascertained. Hence the learned counsel submits that since an application under section 3 of the Partition Act has been filed in C.M.P. No. 13787 of 1975 the Court can pass order as per the provisions contained in section 3 of the Act.

7. Mr. M. R. Narayanaswami, the learned counsel appearing for the respondent submitted that the property is incapable of division and that the Court has inherent jurisdiction apart from the Partition Act, to pass such orders as it deems fit in the interests of justice.

8. It is clear from the order passed by the Court below, which is under Order 26, rules 13 and 14, Civil Procedure Code and section 151, Civil Procedure Code that auction is directed to be held among the sharers. Clearly such direction is outside the purview of the Partition Act. Hence the main question that has to be decided is as to whether the Court has inherent jurisdiction, apart from the Partition Act, to pass order as it thinks just and convenient.

9. Mr. S. Gopalaratnam, the learned counsel appearing for the petitioner cited the decision in O.S.A. No. 108 of 1966, dated 21st December, 1970 *V. Rajeswara Rao* v. *Maheswara Rao* (*died*) and another to support his contention. The principal questions that arose for determination in the said appeal are: (1) whether the Court has an inherent power of sale of the property which is not capable of division apart from the provisions of the Partition Act and whether the plaintiff invoked only such inherent power of Court and not the power under section 2 of the Partition Act; (2) whether the plaintiff having invoked the jurisdiction of this Court under section 2 of the Partition Act is entitled to withdraw his suit under Order 23, rule 1, Civil Procedure Code, at the same time reserving his right to file a fresh suit on the same cause of section; (3) At what stage should the request under section 2 be made; and (4) has the defendant, who invoked the jurisdiction of this Court under section 3 of the Partition Act, an indefeasible right to compel the plaintiff to sell the plaintiff's half share to him at the valuation and prevent the plaintiff from withdrawing the suit? On these questions, the Bench of our High Court definitely held that no general power of sale can be spelt out from the provisions of the Act. On the other hand, the

implication is that the legislation did not intend to confer on the Court a power of sale, apart from the power conferred under the provisions of the Partition Act. In propounding this principle, the Bench of our High Court respectfully agreed with the view expressed in *Nitya Gopal* v. *Pran Krishna*[1] which was later followed in *Ghadhar Ghose* v. *Janaki Nath Ghose*[2]. While doing so, the Bench also dissented from the view expressed by a Bench of the Andhra High Court in *Ramaprasada Rao* v. *Subbaramaiah*[3].

10. The Judgment in O.S.A. No. 108 of 1966 was confirmed by the Supreme Court in *R. Ramamurthi* v. *V. Rajeswararao*[4]. The Supreme Court has also made a specific mention to the effect that the Bench of our High Court considered as to whether the Court has inherent power of sale of the property which is not capable of division apart from the provisions of the Partition Act and whether the plaintiff invoked only such an inherent power and not the power under section 2 of the aforesaid Act. No doubt the main discussion by the Supreme Court is on the validity of withdrawal of the suit under Order 23, rule 1, Civil Procedure Code. But the Supreme Court, discussing the scheme of sections 2 and 3, held "At the same time in order to prevent any oppressive exercise of this privilege those shareholders who did not desire a sale were given a right to buy the others out at a valuation to be determined by the Court." Thus it is clear that the Supreme Court has confirmed the view taken by the Bench of our High Court as regards the points stated above. Apart from this decision, Mr. S. Gopalaratnam also cited *Sampathammal* v. *Veerammal*[5].

11. Mr. M. R. Narayanaswami, the learned counsel, appearing for the respondent tried to distinguish the judgment in O.S.A. No. 108 of 1966 and also the decision reported in *R Ramamurthi* v. *V. Rajeswararao*[1]. The learned counsel submitted that the respondent herein did not invoke the jurisdiction of the Court under the Partition Act and as such the provisions of the Partition Act will not apply to the facts of this case. The learned counsel also stated that when a Court has no *suo moto* jurisdiction to apply the Partition Act and when neither party has invoked the procedure laid down under the Partition Act, it cannot be said that the Court is powerless to effect a division of the property in the manner which it considers equitable in the circumstances of that particular case. Mr. M.R. Narayanaswami, the learned counsel, further submitted that the Partition Act of 1893 is only to amend the existing law and that does not mean the power of the Court is only within the four corners of the Act. To substantiate his contention, the learned counsel cited *Subbamm* v. *Veerayya*[2], *Ramaswami Naicker* v. *Nagammal*[3], *Vsalambl* v. *Nataraja Chettiar*[4] *and Ramaprasada Rao* v. *Subbaramaiah*[5]. The learned counsel also submitted that the main questions that loomed large in O.S.A. No. 108 of 1966 and *R. Ramamurthi* v. *V. Rajeswara Rao*,[1] were with reference to the withdrawal of the suit under Order 23, rule 1, Civil Procedure Code and as such any finding on the inherent powers of the High Court in respect of a partition suit is only *obiter* and the same need not be taken as binding upon this Court. According to the learned counsel, this Court can independently view the matter and give a decision as to whether the Court has inherent jurisdiction, apart from the Partition Act, to pass orders which it considers equitable in the circumstances of the particular case.

12. *Subbama* v. *Veerayya*,[2] is a judgment of a single Judge of this Court and as such the

1. A.I.R. 1952 Cal. 893.
2. A.I.R. 1969 Cal. 59.
3. (1957) 2 An.W.R. 488: A.I.R. 1958 Andh. Pra. 647.
4. (1973) 1 S.C.R. 904: A.I.R. 1973 S.C. 643.
5. (1973) 86 L.W. 500 (1): (1973) 2 M.L.J. 192: A.I.R. 1974 Mad. 32.

1. (1973) 1 S.C.R. 904: A.I.R. 1973 S.C. 643.
2. (1932) 61 M.L.J. 552: 34 L.W. 730: 136 I.C. 203: A.I.R. 1932 Mad. 15.
3. (1970) 83 L.W. 199.
4. (1975) T.N.L.J. 441.
5. (1957) 2 An. W.R. 488: A.I.R. 1958 Andh. Pra. 647.

same cannot prevail over the Bench decision of the High Court rendered in O.S.A. No. 108 of 1966. *Ramaswami Naicker* v. *Nagammal*[1], is prior to the decision rendered in O.S.A. No. 108 of 1966, *Vasavambal* v. *Nataraja Chettiar*[2], rendered by a single Judge of this Court cannot have any effect in the light of the judgment rendered in O.S.A. No. 108 of 1966. The Bench decision of the Andhra Pradesh High Court reported in *Ramaprasada Rao* v. *Subbaramaiah*[3], has been dissented by our Bench in O.S.A. No. 108 of 1966. The various other decisions cited by Mr. M.R. Narayanaswami, the leared counsel, appearing for the respondent such as *Ram Gopal* v. *Bhikamchand*[4]; *Shardaben Hirachand and others* v. *Chandrason and others*[5] and *Ramprasad* v. *Mt. Mukandi*[6], cannot have any binding effect over this Court when especially a Bench of this Court in O.S.A. No. 108 of 1966 has decided this point.

13. It is clear from the discussion and the decision rendered in O.S.A. No. 108 of 1966 that the Court will have inherent powers, apart from the Partition Act, to pass orders in respect of a partition suit. I am in complete agreement with the arguments advanced by Mr. S. Gopalaratnam to the effect that O.S.A. No. 108 of 1966 is the authority for the proposition that the Court will not have any inherent powers apart from the Partition Act, in respect of partition suits. Thus it is clear the Court below has exercised jurisdiction not vested in it by law. The lower Court ought to have decided the case as per the provisions of section 2 of the Partition Act and should not have ordered auction of the suit property in between the sharers. In these circumstances, the order of the Court below is set aside and the matter is remanded to the file of the lower Court for the purpose of disposal afresh in accordance with law. In view of the remand I have made, the respondent herein is at liberty to move the Court below, when the matter is taken up for hearing, for any relief under section 3 of the Partition Act. With this observation, C.M.P. No. 13787 of 1975 is dismissed. There will be no order as to costs.

1. (1970) 83 L.W. 199.
2. (1975) T.L.N.J. 441.
3. (1957) 2 An. W.R. 488: A.I.R. 1958 Andh. Pra. 647.
4. A.I.R. 1964 Raj. 229.
5. I.L.R. 1966 Guj. 143.
6. A.I.R. 1929 All. 443.

S. Gopalarathnam, for Petitioner.

M.R. Narayanaswamy, for *K. Sarvabauman* and *S. Gopalarathnam*, for Respondent.

The Court made the following

ORDER:—I delivered the judgment in C.R.P. No. 2664 of 1975 on 19th March, 1976 Mr. M.R. Narayanaswami, the learned counsel, appearing for the respondent in the above revision petition wanted this matter to be posted again to delete certain sentences in the judgment. Hence I directed this matter to be posted before me Mr. M.R. Narayanaswami pointed out that the sentence:

> "the lower Court ought to have decided the case as per the provisions of section 2 of the Partition Act and should not have ordered auction of the suit property in between the sharers".

has to be deleted and instead, it must read:

> "The lower Court ought to have decided the case as per the provisions of the Partition Act and should have ordered auction of the suit property in between the parties."

Mr. S. Gopalaratnam, the learned counsel, who appeared for the petitioner in the above revision petition, stated that the request made by the respondent herein before the Court below is only under section 2 of the Partition Act and as such, the order dictated can stand as it is.

15. As far as the present case is concerned, I bestowed my attention only as to whether the Court has inherent power apart from the Partition Act to pass orders. I decided, following the Bench decision of our High Court, that the Court has no inherent powers, apart from the Partition Act, to pass orders in partition suits. Hence to state that the lowe

Court has to decide the request made by the respondent herein under section 2 of the Partition Act will, in effect, preclude the respondent from stating that his request is not under section 2. When I mention this, I make it clear that it is open to the petitioner herein to press his view to the effect that the request made by the respondent herein is only under section 2. With these observations, I modify the sentence stated above so as to read in the judgment rendered by me on 19th March, 1976, in, C.R.P. No. 2664 of 1975 as follows:—

> "The lower Court ought to have decided the case as per the provisions of the Partition Act and should not have ordered auction of the suit property in between the sharers."

When I make this alteration in the judgment passed, I also make it clear that it is open to the petitioner to file a petition under section 3 and agitate the matter before the Court below which will decide such petition on merits after giving opportunity for both the parties to place their respective contentions.

R.S. ——— *Revision remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

V. Rajammal .. *Petitioner* *

v.

P. Jesudhas and others ... *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 34, *Rules* 10 *and* 11—*Simple mortgage—Suit on decreed—Hypotheca brought to sale and purchased by plaintiff—Petition to set aside sale—Compromise—Amount to be paid within a specified period by defendants, failing which plaintiff would be entitled to interest—Default by defendants—Plaintiff whether can tack on the interest to mortgage amount and have priority over subsequent encumbrances.*

A suit was brought on a simple mortgage which resulted in a decree. The mortgagor's husband and her legal representatives were defendants and two subsequent encumbrancers were also made parties as defendants 9 and 10. The hypotheca was brought to sale and the plaintiff purchased the property for Rs. 27,050 and paid into Court Rs. 10,574 after setting off the amount due under the decree. The legal representatives of the deceased mortgagor filed an application to set aside the sale and there was a compromise between them and the plaintiff. The legal represtatives were required to pay a sum of Rs.23,439.41 being the aggregate amount of the decree and interest for the sale amount at 6 per cent. within a period of 6 months. The legal representat ves failed to pay as per the compromise. The 9th defendant filed an application for the payment out of Rs. 8,400 due to him and the 10th defendant filed a similar application for payment out of Rs. 2,194 due to him. The plaintiff also filed an application for a sum of Rs. 1,590.25 being the interest due to her as per the compromise and claimed priority over the 9th and 10th defendants by tacking on the amount due with the mortgage amount. On the question whether the claim was tenable.

Held: The interest under the compromise could not be construed as a claim arising out of the mortgage decree and it could not be tacked on to the original loan under the doctrine of tacking since that doctrine had been abolished in 1929 itself.

[*Para.* 5.]

Cases referred to:—

Gyasi Ram v. *Brij Bhussan Das*, (1966) 2 S.C.J. 752: (1966) S.C.R. (Supp.) 109: A.I.R. 1966 S.C. 1950.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Nagercoil, dated 13th November, 1975 and made in E.A. No. 352 of 1973 in O.S. No 47 of 1970 and E.A. No. 250 of 1975 in O.S. No. 47 of 1970 respectively.

S. Padmanabhan, for Petitioner.

S. Ramaswami, for Respondent No. 1.

The Court made the following

ORDER:— These two Civil Revision Petitions can be dealt with together

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*C.R.P. Nos. 3151 and 3152 of 1975.

15th April, 1976.

The short facts are as follows:— In O.S. No. 47 of 1970 on the file of the Subordinate Judge, Nagercoil, the appellant herein obtained a decree for a sum of Rs. 15,933·75 on a simple mortgage executed by one Thankammal, wife of the 1st defendant, Thankammal died. Hence the suit was filed against her husband, the first defendant, and her legal representatives, defendants 2 to 8. Defendants 9 and 10 were the subsequent encumbrancers. The hypotheca was brought to sale and the plaintiff herself purchased the same on 20th January, 1972, for a sum of Rs. 27,050. The decree-holder-plaintiff was allowed to set off the amount due under the decree and therefore a sum of Rs. 10,574 being the balance was deposited into Court. The first defendant filed E-A. No. 98 of 1972 for setting aside the sale. A conditional order was passed requiring him to deposit a certain amount. That conditional order was not complied with. Hence, the sale was confirmed on 6th September, 1973. The 4th defendant (the son of the mortgagor) filed another application to set aside the sale. That was dismissed on 16th April, 1974. This was in E.A. No. 326 of 1973. Aggrieved by the said order defendants 2 to 8 filed A.A. No. 331 of 1974 and the matter was compromised. As per the terms of the compromise, defendants 1 to 8 were required to pay a sum of Rs. 23,439.41 being the aggregate amount of the decree and the interest for the sale amount at 6 per cent. The said amount was required to be paid in three instalments within a period 6 of months. It was provided that if the amount was so paid, the sale in favovr of the plaintiff would stand cancelled, in which event. the decree-holder would be entitled to the refund of Rs. 10,574 deposited by her. It was further provided that if, for any reason, the amount was not so paid, the decree-holder would be entitled to take delivery of the property and was entitled to 6 per cent interest for the sale amount of Rs. 27,050 from the date of the sale, namely, 20th January, 1972 upto the date of delivery possession. This interest was to be recovered from the sum of Rs. 10,574 in deposit in Court and the balance alone was to be withdrawn by defendants 1 to 8. The terms of the compromise were not complied with by the judgment-debtors. The 9th defendant filed E.A. No. 352 of 1973 praying for a payment out of Rs. 8,400 being the amount due under the mortgage executed in his favour by the first defendant and his wife. The 10th defendant filed a similar applition in E.A. No. 353 of 1973 for payment out of Rs. 2,194 due under the mortgage executed in his favour. The decree-holder filed E.A. No. 250 of 1975 for a sum of Rs. 5,590.25 being the interest due as per the terms of the compromise decree in A.A.O. No. 331 of 1974. All these three applications came to be dealt with by the learned Subordinate Judge of Nagercoil under a common order. Having regard to the fact that the amount in Court deposit could not satisfy all the claims, the question was whether the decree-holder could claim priority for the sum of Rs. 5,590.25 over the claims of the 9th and 10th defendants. The learned Subordinate Judge by his order dated 13th November, 1975, allowed E.A. No. 352 of 1973 and dismissed E.A. Nos. 353 of 1973 and 251 of 1965. C.R.P. No. 3151 of 1975 is against E.A. No. 352 of 1973, while C.R.P. No. 3152 of 1975 is against E.A. No. 250 of 1975.

2. The only question that arises for my determination is whether the decree-holder could tack on that sum of Rs. 5,590.25 to his original loan and thereby claim priority for the said sum. In other words, whether the amount could be construed as due under the mortgage decree, in accordance with the provisions of Order 34, rules 10 and 11, Civil Procedure Code.

3. Mr. S. Padmanaban, learned counsel for the petitioner contends that having regard to the terms of the compromise in A.A.O. No. 331 of 1974, this amount is one which will form part of the mortgage decree and therefore priority could be claimed. The fact that neither the 9th defendant nor the 10th defendant were parties to that compromise would be of no consequence, since they are subsequent encumbrancers. The intention of the parties under the compromise was to provide for this amount and the additional sum which was intended to be a part of the mortgage decree, can also be recovered as if it is a part of the original decree. In support of this submission, the learned counsel relies on Halsbury's Laws of England, Volume 27 (Third Edition), paragraph 866 at page 436;

"Where the mortgage provides for interest up to the day fixed for payment, but not beyond, a contract for the continuance of the same rate of interest until payment is not implied, but subsequent interest will be given by way of damages for breach of contract, and if the original rate of interest is not above five per cent, it will generally be adopted as a proper measure of damages for the subsequent delay. This rule applies both to proceedings on the covenant, and to accounts taken in redemption or foreclosure. In taking such accounts interest cannot be ascertained as damages, but it will be awarded on the same footing as consideration for allowing the loan to remain unpaid."

4. Mr. S. Ramaswami, learned counsel for the respondents submits that even in a case where interest was awarded by a Court, it cannot be considered to be a secured debt. If that be so, this amount can be recovered only as an ordinary debt. In support of this submission he relies on *Gyasi Ram* v. *Brij Bhushan Das*[1].

5. The important point to be noted here is the compromise decree provided payment of interest. But it cannot be construed as a claim arising out of the mortage. That was only by way of a simple money decree. Of course, if there is any surplus, the mortagee (decree-holder) can recover. Certainly it cannot be tacked on to the original loan under the doctrine of tacking, since that doctrine having been abolished in 1929 itself.

6. The passage relied on by Mr. S. Padmanabhan in paragraph 866 at page 436 of Halsbury's Laws of England, Volume 27 (Third Edition), is of no assistance to him since those were claims arising under the mortgage, but the position here is entirely different. The fact that the 9th and 10th defendants were not parties to the mortgage decree may be of no consequence in one sense, provided the amount claimed arose under the mortgage. But here it is not so.

1. (1966) 2 S.C.J. 752 1966 S.C.R. (Supp.) 109: A.I.R. 1966 S.C. 1950.

7. In *Gyasi Ram* v. *Brij Bhushan Das*[1] the scope of Order 34, rule 7, Civil Procedure Code, came up for consideration:—

"A preliminary decree declared the amount due upto a certain date towards principal and interest and also provided for certain rate of interest on a certain sum from that date and directed, as required by Cl. (*c*) of Order 34. rule 17 (1) a final decree to be passed in favour of a mortgagor, provided he paid in the Court the amount found due before a certain date. It also laid down that in the event of failure to so deposit the amount in the Court, a final decree for foreclosure in favour of the mortgagee was to be drawn. The mortgagor appealed and obtained a stay order requiring him to pay the amount due under the preliminary decree till the disposal of the appeal. The stay was granted on the mortgagor's undertaking to pay enhanced rate of interest during the period of stay. The appeal was dismissed and the mortgagor deposited the amount due under the preliminary decree with interest but without the enhanced rate of interest. On the question whether failure to pay the enhanced rate of interest as per the undertaking could result in the passing of final decree for foreclosure:

Held: that this extra amount which was to be paid on account of mortgagor's undertaking did not come within the expression "in respect of subsequent costs, charges, expenses and interests". The decree for foreclosure could not be passed for failure to pay this amount"

This case fully supports the respondent.

8. For these reasons, I hold that there are no merits in these civil revision petitions and they will stand dismissed. However, I make no order as to costs.

S.J. —— *Petitions dismissed.*

1. (1966) 2 S.C.J. 752: 1966 S.C.R. (Supp.) 109: A.I.R. 1966 S.C. 1950 at 1953.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*A. Varadarajan, J.*

Nataraja Mudaliar ... *Appellant**

v.

Panduranga Mudaliar ... *Respondent.*

Deed—Construction—Gift of properties to T *—Limited estate or absolute estate—Clause providing that* 'P' *was entitled to properties undisposed of at the time of the death of* T*—Effect.*

A deed of settlement provided that after the settlor's lifetime his wife *T* was to take the properties with absolute rights and, after the demise of both of them, his younger sister's son *P* should perform their funeral ceremonies and take such of the properties as remained in *T's* possession at the time of her death with absolute rights. On a construction of the settlement.

Held: *T* had only a right to enjoy the properties with absolute powers of disposal during her lifetime under the settlement and the clause providing for *P* becoming entitled to the properties remaining undisposed of by her at the time of her death was not repugnant and void and would only show that he intended that *T* should only have such limited right and not have the absolute right of taking the properties to be enjoyed by her from generation to generation. On the death of *T*, therefore, *P* became entitled to take the properties left undisposed of by her.

[*Para.* 15.]

Cases referred to:—

Sahebzada Mohammad Kamgarh Singh v. *Jagadish Chandra Deo Dhabal Deb and others*, (1960) 3 S.C.R. 604: (1962) 1 S.C.J. 260: A.I.R. 1960 S.C. 953; *Narayana Das* v. *Arumughathammal*, (1962) 1 M.L.J. 401: 75 L.W. 71: A.I.R. 1962 Mad. 259; *Ramkishore Lal* v. *Kamal Narain*, (1963) 2 S.C.R. (Supp.) 417: A.I.R. 1963 S.C. 890; *Pugalamperumal Pillai* v. *Thangathammal*, (1949) 1 M.L.J. 389: 62 L.W. 260: A.I.R. 1949 Mad. 690; *Tiruchendur Sri Subramaniaswami Temple* v *P. Ramaswami Pillai*, (1950) 52 Bom.L.R. 472; *Manumalaswami* v. *Chinna Narayanaswami*, 63 M.L.J. 107: 35 L.W. 756: 138 I.C.276: A.I.R. 1932 Mad. 489; *Sanford* v. *Sanford*, (1901) 1 Ch. 939; *Williams* v. *Pounder*, (1887) 56 L.J. Ch. 113; *Thayalai Achi* v. *Kannammal*, (1935) 68 M.L.J. 707: 156 I.C. 846: 41 L.W. 604: A.I.R. 1935 Mad. 704; *S.M. Hara Kumari* v. *Mohini Chandra Sarkar*, (1908) 12 C.W.N. 412; *Ananthasayana* v. *Kondappu*, (1940) 1 M.L.J. 212: 191 I.C. 17: A.I.R. 1940 Mad. 479; *Jabamalai Mariammal* v. *Madalaimuthu Thevar*, (1966) 79 L.W. 141; *Lakshmi Ammal* v. *Allauddin Sahib*, (1962) 2 M.L.J. 187: A.I.R. 1962 Mad. 247; *Ramasreenivasa Iyengar* v. *Padmasani Ammal*, (1973) 1 M.L.J. 34.

Appeal against the decree of the Court of the Subordinate Judge, Cuddalore, in Appeal Suit No. 185 of 1968, preferred against the decree of the Court of the District Munsif of Tirukoilur in Original Suit No. 302 of 1965.

K. Sarvabhauman and *K. Sampath*, for Appellant.

P.S. Ramachandran, for Respondent.

The Court delivered the following

JUDGMENT:—The defendant, who failed in both the Courts below, is the appellant. One Veerappa Mudaliar had two daughters, Amirthammal and Ammaniammal and one son, Nagarathna Mudaliar. Shanmugam *alias* Arumugam, who is stated to have died in 1957, and Thillaikannu Ammal are the son and daughter of Amirthammal. The appellant is the son of the said Shanmugam *alias* Arumugam. Thillaikannu Ammal, the daughter of Amirthammal, had been married to her maternal uncle Nagarathna Mudaliar. Panduranga Mudaliar, the respondent herein, is the grandson of Ammaniammal by her son Krishnaswami Mudaliar. The suit properties, which are a house with a well, 74 cents of wet land and an oil engine, admittedly belonged originally to Nagarathna Mudaliar. Nagarathna Mudaliar had executed the settlement deed, Exhibit A-1, dated 9th April, 1963, in favour of his wife Thillaikannu who died after him on 2nd May, 1955. The respondent claimed title to the suit properties as the heir of his paternal aunt Thillaikannu, on the basis that she had become absolutely entitled to Naga-

*S.A. No. 1687 of 1972. 4th December, 1975.

rathna Mudaliar's properties under the the settlement deed, Exhibit A-1. Exhibit A 1 was registered compulsorily on 28th January, 1964, as Nagarathna Mudaliar appears to have denied its execution. The respondent filed the suit for declaration of his title to the suit properties and for an injunction restraining the appellant from interfering with his possession or alternatively for recovery of possession of the properties.

2. The appellant set up another settlement deed, Exhibit B-6, dated 11th April, 1963, as having been executed in his favour by Nagarathna Mudaliar in respect of the suit properties and contended that he had become entitled to the suit properties by virtue of that settlement deed. In the alternative he contended that under the settlement deed, Exhibit A-1 itself, he had become entitled to the suit properties which had remained undisposed of by Thillaikannu Ammal prior to her death, on the ground that Nagarathna Mudaliar had conferred an absolute estate on him under Exhibit A-1 on such of his properties as remained undisposed of by Thillaikannu Ammal, the settlee under Exhibit A-1.

3. The Courts below found that Exhibit B-6 was not genuine and they upheld Exhibit A-1 and decreed the suit for declaration and possession, holding that the respondent became entitled to the suit properties under the settlement deed, Exhibit A-1, as they had not been disposed of by Thillaikannu Ammal during her lifetime. Hence this second appeal.

4. The only question arising for consideration in this second appeal is whether Thillaikannu Ammal had an absolute estate in the properties mentioned in the settlement deed. Exhibit A-1, and the clause in Exhibit A-1 providing for the respondent becoming absolutely entitled to such of the properties mentioned in the settlement deed, Exhibit A-1, as remained undisposed of by Thillaikannu Ammal during her lifetime, is a repugnant clause which does not affect the absolute estate of Thillaikannu Ammal. The answer to this question has to be found in the proper interpretation of this irrevocable settlement deed, Exhibit A-1, which reads thus:

நீ என் மனைவியானபடியாலும் நமக்கு எவ்வித சந்ததியும் இல்லாத படியாலும் உன்னைத் தவிர எனக்கு சட்டப்படி வேறு வாரிசுகள் இல்லாத படியாலும் என் ஜீவதிசைக்குப் பிறகு நீ நிம்மதியாக வாழ்ந்து வரவேண்டுமென்ற நல்ல எண்ணத்தாலும்.... எனக்குச் சுயார்ஜிதமாயும் சர்வ சுதந்திர பாத்தியமும் அனுபவமும் ஆனதுமான.....சொத்துக்களை இதன் மூலமாய் உனக்கு செட்டில்மெண்டு செய்து உன்னுடைய ஸ்வாதீனம் செய்து வைத்திருப்பதால் இனி நாளது தேதி முதல் ஷெ சொத்துக்களை சர்வசுதந்திரமாய் ஆண்டு அனுபவித்து கொள்ளவேண்டியது. என் ஜீவதிசைக்குப் பிறகும் உன் ஜீவதிசைக்குப் பிறகும் செய்யவேண்டிய உத்திர கிரியைகளை என் தங்கை அம்மணி அம்மாள் பேரனும் திருக்கோயிலூர் கிருஷ்ணஸ்வாமி முதலியார் குமாரனுமான பாண்டுரங்கன் செய்துவிட்டு தற்ஸமயம் உன் வசமுள்ள மீதி சொத்துக்களை சர்வசுதந்திரமாய் அடைந்து கொள்ளவேண்டியது....''

5. The settlement deed provides that Thillaikannu Ammal should enjoy the properties with absolute rights over them as she was the wife and only heir of the settlor Nagarathna Mudaliar and they had no issues and he desired that she should lead a comfortable life after his death. There is a further clause in the settlement deed to the effect that the respondent should perform the ceremonies of Nagarathna Mudaliar and Thillaikannu Ammal and take such of the properties as remained in the possession of Thillaikannu Ammal at the time of her death, with absolute rights. The learned counsel for the appellant submits that this clause providing for the respondent taking absolutely such of the properties covered by the settlement deed in Exhibit A-1 as were undisposed of at the time of Thillaikannu Ammal's death is repugnant to the earlier clause conferring an absolute estate on Thillaikannu Ammal in respect of the properties mentioned in the settlement deed, and has, therefore, to be ignored as void. On the other hand, the learned counsel for the respondent submits that the settlement deed has to be read as a whole and that if it is done so, it will be clear that what had been intended by the settlor was that his wife Thillaikannu Ammal should no doubt enjoy the properties mentioned in the

settlement deed with absolute rights and that the respondent, who is no other than Nagarathna Mudaliar's sister's grandson should perform the ceremonies of himself and his wife and take absolutely such of the properties covered by the settlement deed as remained undisposed of by the settlee, Thillaikannu Ammal.

6. We find the following passage at page 1090 of Vol. 39 of the Third Edition of Halsbury's Laws of England:

> "Where there is a clear absolute gift followed by words purporting to confer a power of disposition with a giftover if the power is not exercised, the absolute gift takes effect; and the giftover is inconsistent with it and is void.....
>
> Where there is an absolute gift of property followed by a gift over of the property after the death of the donee or after his death without issue or without leaving children, or of that part of the property of which he shall not have disposed, the absolute gift prevails, and the ultimate gift is repugnant and void. It may, however, appear sufficiently clearly on the construction of the will as a whole that a gift which is in terms absolute is in fact intended as a gift of a life interest only; and this construction is not prevented merely by the fact that the gift over is of 'whatever remains' or in similar terms".

What should be done while interpreting documents of the kind has been mentioned in some of the decisions. The Supreme Court has observed in *Sahebzada Mohammad Kamgarh Singh* v *Jagdish Chandra Deo Dhabal Deb and others*[1].

> "The task being to ascertain the intention of the parties, the cases have laid down that that intention has to be gathered by the words used by the parties themselves. In doing so the parties must be presumed to have used the words in their strict grammatical sense. If and when the parties have first expressed themselves in one way and then go on saying something, which is irreconcilable with what has gone before the Courts have evolved the principle on the theory, that what once had been granted cannot next be taken away, that the clear disposition by an earlier clause will not be allowed to be cut down by a later clause. Where there is ambiguity it is the duty of the Court to look at all the parts of the document to ascertain what was really intended by the parties. But even here the rule has to be borne in mind that the document being the grantor's document, it has to be interpreted strictly against him and in favour of the grantee."

This decision was relied upon by the learned counsel for the appellant who submitted that the terms of Exhibit A-1 had to be interpreted strictly against Nagarathna Mudaliar and in favour of the grantee, Thillaikannu Ammal, and that if that is done, it would be clear that Thillaikannu Ammal got an absolute estate in the properties and that the subsequent clause providing for the respondent taking such of the properties as remained on her death undisposed of by her absolutely is a repugnant clause which is void. On the other hand, the learned counsel for the respondent relied upon the decision of a Bench of this Court in *Narayana Doss* v. *Arumughathammal*[1] where the learned Judges have observed:

> "The Courts should not be astute in discovering repugnant provisions in a will merely because of a slight inconsistency between portions of the testamentary instrument. As far as possible a harmonious construction of all the provisions in the will should be arrived at, as otherwise, the brushing aside of a particular clause on the ground of its repugnancy to another, may result in creating a will which was never contemplated by the testator."

The learned counsel for the respondent relied on the decision of the Supreme Court in *Ramkishore Lal* v. *Kamal Narain*[2] where the learned Judges have observed:

1. (1960) 3 S.C.R. 604: (1962) 1 S.C.J. 260: A.I.R. 1960 S.C. 953.

1. (1962) 1 M.L.J. 401: 75 L.W. 71: A.I.R. 1962 Mad. 259.
2. (1963) 2 S.C.R. (Supp.) 417: A.I.R. 1963 S.C. 890.

"Sometimes it happens in the case of documents as regards disposition of properties, whether they are testamentary or non-testamentary instruments, that there is a clear conflict between what is said in one part of the document and in another. A familiar instance of this is where in an earlier part of the document some property is given absolutly to one person but later on, other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion. What is to be done where this happens ? It is well settled that in case of such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded as unsuccessful attempts to restrict the title already given. It is clear, however, that an attempt should always be made to read the two parts of the document harmoniously, if possible. It is only when this is not possible, *e.g*, where an absolute title is given is in clear and unambiguous terms and the later provisions trench on the same, that the later provisions have to be held to be void".

I will consider the other decisions to which my attention was invited by the learned counsel for the parties in the light of the general observations made in the aforesaid decisions about what care should be taken in the interpretation of such documents.

7. The learned counsel for the appellant relied upon the decision of a Bench of this Court in *Pugalumperumal Pillai* v. *Thangathammal*[1]. and of the Privy Council in *Tiruchendur Sri Subramaniaswami Temple* v. *P. Ramaswami Pillai*[2]. and submitted that the subsequent clause in Exhibit A-1 making a provision for the respondent is repugnant and void The relevant portions of the gift deed which came up for consideration in the Bench decision of this Court runs as follows:

"As I have given away to you the property.... as *stridhanam* gift, you shall hold and enjoy the aforesaid property hereditarily and from son to grandson and so on as long as the sun and moon last. After your lifetime, your issues if there are any, shall get the aforesaid property. If you have no male or female issues, the aforesaid property shall revert to me and to my male heirs. I shall, till my lifetime, reside jointly with you in the thatched house mentioned in the schedule".

The learned Judges have held, having regard to the use of the words of disposition so well-known and accepted as implying that absolute rights had been conferred on the donee and that the property did not revert to the donor. This decision does not help the appellant as there are no such well-known words of disposition indicating the conferment of absolute estate in the properties on the settlee Thillaikannu Ammal in Exhibit A-1.

8. In the will which came up for consideration before the Privy Council in the aforesaid decision, the testator bequeathed to his only son all his properties with the direction that he should solely enjoy them and he also added that if he or his son had no child, the property shall pass to Sri Subramaniaswami at Tiruchendur. For the appellant-temple it was argued before the Privy Council that the words "if he or his son has no child, the said properties shall pass to Subramaniaswami at Tiruchendur" are a qualification, and if the will is read as a whole, they have the effect of creating a devise in favour of the deity of the temple in the event of Picha Pillai dying childless. Their Lordships have observed:

"Their Lordships are of the opinion that the additional words do not have this effect. Section 95 of the Indian Succession Act says that where property is bequeathed to a person he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him. It follows from what has already been said that their Lordships consider that a restricted interest was not intended here. They agree with the opinion of the High Court that the testator, as an afterthought wanted to determine the devolution of the property in case his

1. (1949) 1 M.L.J. 389: 62 L.W. 260: A.I.R. 1949 Mad. 690.

2. (1950) 52 Bom.L.R. 472.

son should die without issue, but not in any way to limit either the character of the estate that was given by the earlier bequest in favour of the son, or to make it conditional and liable to be divested at his death without issue. The testator had only one son and it was natural that he should desire that his estate should devolve upon him unconditionally"..

The learned counsel for the appellant laid stress on the following words in Exhibit A-1 and submitted that they would indicate that the donor intended that the donee, his wife, should take the properties absolutely and not that she should have only a limited power of disposition over the properties during her lifetime.

The words are:

நீ என் மனைவியானபடியாலும் நமக்கு எவ்வித சந்ததியும் இல்லாத படியாலும் உன்னைத் தவிர எனக்கு சட்டப்படி வேறு வாரிசுகள் இல்லாத படியாலும் என் ஜீவ திசைக்கு பிறகு நீ நிம்மதியாக வாழ்ந்து வரவேண்டு மென்ற நல்ல

These words may, no doubt, show that, the settlor had intended that his wife, who was the only heir and who had no issues, should take the properties absolutely as he desired and that she should lead a comfortable life after his death. But he also added in the settlement deed that the respondent, who is his other sister's grandson, should perform the ceremonies of himself and his wife and take such of the properties as remained undisposed of by his wife at the time of her death. It is necessary to see what is the effect of this subsequent clause in the settlement deed in the light of the other decisions to which my attention was drawn in the course of the arguments.

9. In an early decision of this Court in *Manumalaswami* v. *Chinna Narayanaswami*[1], a Bench of this Court has observed:

" In *Sanford* v. *Sanford*[1] Joyce, J., pointed out that: The rule is to construe a will *ut res magis valeat quam pereat,* and to give effect, so far as possible to all the words used by the testator, quoting the dictum of Kay, J., in *Williams* v. *Pounder*[2]. In the judgment above referred to Joyce, J., observed: It has been said by the Court of appeal that the true way to construe a will is to form an opinion apart from the decided cases and then to see whether these decisions require any modification of that opinion, not to begin by considering how far the will in question resembles other wills upon which decisions have been given."

In that case the gift to the wife conferred upon her a power of disposal limited explicitly to her lifetime. The gift over on the other hand, was of a quite absolute estate, which was to pass from father to son, from generation to generation. The gift did not include a power of disposition by will, but a power of disposition *inter vivos.* The learned Judges have observed in that decision:

"The widow could dispose of the property in her lifetime, but had no power to dispose of it by will and, if any property remained at her death, the will of the testator was to settle its destination. The rule in such cases is that, if the intention of the testator as represented by his words, was to confer an absolute estate, that estate cannot be cut down by anything that follows. If, however, the intention is doubtful, the addition of a gift over may be evidence that his intention was to confer no more than a limited interest. Here the worst that can be said is that his intention, as conveyed by the language of the gift was not clear and the gift over showed that his intention was to confer no more than a limited estate. If the will is construed in this way that the intention was to give the wife a limited estate, with a power of disposal *inter vivos* and to give over what

1. (1932) 63 M.L.J. 107: 35 L.W. 756: 138 I.C. 276: A.I.R. 1932 Mad. 489.

1. (1901) 1 Ch. 939.
2. (1887) 56 L.J. Ch. 113.

she did not dispose of, every word of the will becomes effective. That is in accordance with the first rule of construction of testamentary dispositions and it has, as Joyce, J., observed in the case already cited 'the not unimportant merit of effectuating the obvious and expressed desire of the testator'. The will in that case has been held by the learned Judges to have conferred only a limited right on the widow."

10. The next decision is of another Bench of this Court in *Thayalai Achi* v. *Kannammal*[1] alias *Ponnammal Achi*[1]. The will in that case provided that the testator's wife shall enjoy with all powers of alienation by gift, exchange or sale the movable and immovable properties of the testator and herself discharge the debts payable by him. It further provided that if after the alienations made by the wife any property, movable or immovable, was left at the time of her death, they shall be taken absolutely by one Nataraja. It has been held that the wife took as absolute estate under the will, but if she did not dispose of the property during her lifetime or by will the property passed to Nataraja and that the bequests were not void because of repugnancy or uncertainty. The learned Judges have observed:

"This present case seems to be very near to *S.M. Hara Kumari* v. *Mohim Chandra Sarkar*[2], where the bequest was to a wife in the following terms:

'You shall become possessor of my properties. You shall have the right and power to alienate by gift or sale. My daughter shall be entitled to and be possessor of whatever properties shall remain after your death and the said daughter shall have the same rights as you have'.

The only difference is that there is a distinction drawn between being entitled to and being possessor of. There were also other indications in the will of a desire on the part of the testator to benefit the daughter. It was indicated that if one looked at the bequest to the widow alone it looked like an absolute gift but that one could not, in construing the will, shut one's eyes to the words relating to the daughter. It was held that looking at the will as a whole the widow took an estate for life with a power of alienation and to the extent to which the power was not exercised the daughter similarly took the property".

1. (1935) 68 M.L.J. 707: 156 I.C. 846: 41 L.W. 604: A.I.R. 1935 Mad. 704.

2. (1908) 12 C.W.N. 412.

11. The will in *Anantnasayana* v. *Kondappa*[1], decided by Venkataramana Rao, J, stated that all the designated properties of the testator shall, after his lifetime be enjoyed by his wife with powers of alienation by gift mortgage, sale, etc., and after her lifetime, the properties then remaining shall, according to their wills executed by him be held and enjoyed by his daughter Kuppammal with powers of alienation by gift, mortgage, sale, etc. The learned Judge has observed:

"*Prima facie*, where powers of absolute disposition are conferred on the donee, it is taken as an indication that the testator intended to create an absolute estate on the donee. The will in this case confers powers of alienation of the widest amplitude, such as gift, mortgage, sale, etc. In my opinion the language is wide enough to confer a power of disposition both testamentary and non-testamentary. Therefore, giving the plain grammatical meaning to the said language it would follow that the nature of the interest taken by the widow is an absolute estate. It is settled law that if an absolute estate is given to a donee, a gift over on the termination of the life of the donee of the property remaining undisposed of by the donee is invalid, the principle being that once a property is given absolutely to another, he cannot dispose of another man's property........

The use of the words 'according to the wills executed by him' would show that in the case of the daughter he means

1. (1940) 1 M.L.J. 212: 191 I.C. 17: A.I.R. 1940 Mad. 479.

to have a heritable estate to be enjoyed by her from generation to generation. Therefore, if the will were to be construed by giving Chinnammal a life estate with an absolute power of appointment the intention of the testator will be effectuated rather than frustrated. In this view, Chinnammal would not take an absolute estate but a life estate with a power of appointment and the gift over will be valid only with reference to what was left undisposed of by Chinnammal. But Mr. Rajah Iyer contends that either the estate conferred must be an absolute estate or a life estate and to construe a disposition as life estate with absolute power of appointment is tantamount to construing the disposition as an absolute estate. There is considerable force in the argument of Mr. Rajah Iyer but the law does make a distinction between an absolute estate and a life estate with a power of appointment. In the one case what is conferred is property that is the interest conferred is capable not only of disposition by the donee but capable of transmission to his heirs and in the case of the other, that is, a life estate with a power of appointment, what is conferred is not property but power."

The same view has been expressed by Ramamurti, J., in *Jabamalai Mariammal* v. *Madalaimuthu Thevar* [1], where the learned Judge has observed:

> "Even though for practical purposes there is no distinction between an absolute estate and a life estate coupled with a power of appointment by will or deed, it is settled law that the two ideas are two distinct conceptions and that it is quite competent to a testator to confer a life estate, with a power of appointment by a deed or will following it up by an independent or subsequent bequest, in case the first legatee dies without exercising the power of appointment."

12. The will involved in *Lakshmi Ammal* v. *Allauddin Sahib* [2], contained the following two clauses, among others :

> "After my lifetime, my wife Lakshmi Ammal should perform my death ceremonies, the aforesaid Lakshmi Ammal should possess and enjoy the undermentioned properties with full powers of alienation, gift, sale and with absolute right; and
>
> After my wife's death, my daughters both the aforesaid Amirthammal and Ammakutti *alias* Vadamalai Ammal should perform her death ceremonies, Amirthamal, my first daughter should take the first item and Ammakutti *alias* Vadamalai Ammal should take the second item with absolute rights and enjoy the same".

Ramakrishnan, J., who decided that case, has observed:

> "After giving an absolute estate to his wife over the two items of scheduled properties, he provided that these scheduled properties, after the wife's lifetime should devolve—item 1 on the first daughter and item 2 on the second daughter—who would have absolute rights. When the testator took care to indicate that the properties without any distinction even after his wife's lifetime should go to each of the daughters, it should be presumed that it was clearly in his mind that the wife's estate was only to be a limited estate or life estate, and not an absolute one".

13. No doubt, in the present case, there is nothing in the settlement deed, Exhibit A-1, to show that Thillaikannu Ammal, the donee, should enjoy the properties and leave them without any diminution to be taken absolutely by the respondent.

14. The will involved in *Ramasreenivasa Iyengar* v. *Padmasani Ammal* [1], provided that the two ladies should take the properties in equal shares with absolute rights, but the share of the lady without issues will, however, after her death, be taken by the lady with issues along with her children. Ganesan, J., has held in that case that the testator intended by the earlier clause that the two daughters should take only a life estate if they had

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1. (1966) 79 L.W. 141.
2. (1962) 2 M.L.J. 187: A.I.R. 1962 Mad. 247.

1. (1973) 1 M.L.J. 34.

no issue and that on the death of the lady without issues the property should be taken absolutely by the surviving daughter with issues. And the learned Judge has observed that the dominant intention was to preserve the estate in his family and that he intended that the estate should descend ultimately to his grand children, following the decision in *Lakshmi Ammal* v. *Allauddin Sahib*[1] and other decisions.

15. The appellant, who is older than the respondent, is the son of Nagarathna Mudaliar's wife's brother Shanmugam *alias* Arumugam while the respondent is the grandson of Nagarathna Mudaliar's other sister Ammani Ammal by her son Krishnawami Mudaliar. Nagarathna Mudaliar does not appear to have intended to confer any benefit on the appellant, though he is the son of his own wife's brother; whereas he appears to have intended to confer benefit on the respondent in respect of such of the properties as remained undisposed by his wife at the time of her death. The appellant would inherit the properties as the heir of Thillaikannu Ammal if the donor Nagarathna Mudaliar had not made the provision in favour of the respondent in the settlement deed, Exhibit A-1. Therefore, it would appear that Nagarathna Mudaliar intended to confer a benefit on the respondent in respect of such of the properties as remained undisposed of by Thillaikannu Ammal who, no doubt, had absolute powers of disposal of the properties by any document such as sale, mortgage or will *inter vivos*. Therefore, I hold, in view of the decisions referred to above, that Thillaikannu Ammal had only a right to enjoy the properties with absolute powers of disposal during her lifetime under the settlement deed, Exhibit A-1, and that the clause in Exhibit A-1 providing for the respondent becoming entitled to such of those properties as remained undisposed of by her at the time of her death is not repugnant and void and would only show that he intended that Thillaikannu Ammal should only have such limited right and not have the absolute right of taking the properties to be enjoyed by her from generation to generation. Therefore, I agree with the Courts below and hold that the respondent had become entitled to the suit properties by virtue of the settlement deed, Exhibit A-1, as those properties had been left undisposed of by Thillaikannu Ammal by any document *inter vivos*.

16. The appeal is, therefore, dismissed, but in the circumstances of the case, without costs.

17. No leave.

R.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*N.S. Ramaswami, J.*

Dharmalinga Mudaliar .. *Appellant**

v

N. Mohamed Ebrahim, and another .. *Respondents.*

S. Dharmalinga Mudaliar .. *Petitioner.*

v.

Mallikaarjunan and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 96 (2) (b) (ii) *—Accident—Head—on collision between bus and car—Motor car badly damaged— Occupants of car injured—Owner of car claiming compensation for damage to car—Injured persons claiming compensation for injury—Owner of car and insurer, parties—Negligence of driver of bus—Driver having no licence to drive heavy vehicle—Policy of Insurance covering accident only if the person driving the vehicle had licence to drive the same —Insurer, if exonerated.*

Section 96 (2) (ii) of the Motor Vehicles Act, 1939, provides that the insurer can issue a policy subject to a condition excluding driving by a named person or

1. (1962) 2 M.L.J. 187: A.I.R. 1962 Mad. 247.

* A.S. No. 348 of 1972 and C.R.P. Nos. 851 to 854 of 1972.

30th January, 1976.

persons or by any person who is not duly licensed, or by any person who had been disqualified for holding or obtaining a driving licence during the period of disqualification. The insurer, in the instant case, had availed of this statutory provision and inserted the particular condition in the policy. Therefore it was not open to contend that the insurer should not have been exonerated, even if the party claimants press the claim against the insurer.

[*Para.* 15.]

Cases referred to:—

New Asiatic Insurance Co., Ltd. v. *Pessumal Dhanmal Aswani and others*, (1964) 2 Com. L.J. 83: (1964) 1 S.C.R. 867: (1964) 2 S.C.J. 428: A.I.R. 1964 S.C. 1736; *Chanchalben* v. *Shailesh Kumar Pandrang Thakore*, 1974 A.C.J. 393; *B. Appa Rao* v. *Dunna Mukanda Rao*, (1973) A.C.J. 222; *The New India Assuarance Company Ltd.* v. *Srikanta Ghose*, (1972) A.C.J. 153.

Appeal against the decree of the Court of the Subordinate Judge, Thanjavur, dated 30th March, 1972 and passed in Original Suit No. 73 of 1969 and petitions under Article 227 of the Constitution of India praying the High Court to revise the orders dated 30th October, 1971 and made in (1) M.A.O.P. 2/71; (2) M.A.O.P. 3/71; (3) M.A.O.P. 4/71; and (4) M.A.O.P. 5/71, respectively on the file of the Motor Accidents Claims Tribunal Subordinate Judge, Thanjavur.

M.A. Sadanand, for Appellant in Appeal.

K. Sarvabhauman, for 1st Respondent in the Appeal.

T.S. Rangarajan, for 2nd Respondent in Appeal.

The Court delivered the following

JUDGMENT:—This appeal and the revision petitions arise out of the claims made regarding a motor accident. The accident took place on 21st December, 1967. The motor car bearing registration No. MSY 6929 belonging to Mohammed Ebrahim, the plaintiff in O.S. No. 73 of 1969, was being run as a taxi. The bus M.D.O. 5783 belonging to the first defendant in that suit was the other motor vehicle involved in the accident. It was a head-on collision between the two vehicles in which the motor car (MSY 6929) came to be badly damaged. The occupants of the car had been injured. The claim in the suit, out of which A.S. No. 342 of 1972 arises, is made by the owner of the car (taxi) regarding the damage to the vehicle on the ground that the accident was due to negligence on the part of the driver of the bus. The four revision petitions arise out of four different claim petitions filed by the injured in the said accident.

2. The owner of the bus and the insurer thereof who were made parties to the suit as well as the claim petitions contested the claims. The Court below held that the accident was due to the negligence on the part of the driver of the bus and that therefore, the owner of the car as well as the injured are entitled to compensation. It fixed the compensation payable to the owner of the car (plaintiff in O.S. No. 73 of 1969) towards the damage to the vehicle at Rs. 9,000 and further added a sum of Rs. 2,000 as the amount that the owner of the car lost as a result of the accident, inasmuch as the car which was running as taxi was not able to be put on the road for a long period. Regarding the four injured the Court below fixed certain amounts as compensation.

3. It held that the owner of the bus alone was liable to pay the damages to the owner of the car as well as the compensation payable to the injured, exonerating the insurer.

4. The case of the insurer has been that the bus was driven at the time of the accident by a person who had no licence to drive a vehicle of that type and that therefore, as per the conditions of the policy, the accident is not covered by the same. This contention of the insurer has been accepted by the Court below and hence the owner of the bus alone has been made liable. Hence the appeal and the revision petitions by the owner of the bus.

5. Regarding the question of negligence, there is not much to be said in favour of the owner of the bus. A rough

plan prepared by the police officer who investigated the accident has been exhibited in the case and correctness of the same is not questioned. That plan itself shows the position of the two vehicles when the head-on collision took place. The car was going on its proper track and it was the bus which swerved from its track and came to the wrong side and attacked the car. Kalifullah who was the driver of the car gave evidence to the effect that he was driving the car keeping to the proper side and the bus, all of a sudden swerved from its path and attacked the car. As against this, one Swaminathan, claiming to be the driver of the bus, has been examined as D.W. 2. He said that, that, he drove the bus in the proper track and the taxi was driven in a zig-zag way and that, was the cause for the accident. There are sufficient grounds to hold that Swaminathan, D.W. 2, is a put up witness and that he was not the driver of the bus at the relevant time, though he might be the authorised person to drive the said vehicle. It is in evidence that one Murugayyan, a mechanic, was the person who drove the bus at the relevant time. It was the said Murugayyanwho had been prosecuted by the police for rash and negligent driving regarding the accident and he had been convicted by the criminal Court. Under such circumstances, it is not seriously contended before me that it was Swaminathan, D.W. 2, who actually drove the bus. That means, D.W. 2 is not a competent witness to speak about the manner in which the accident took place. The evidence of P.W. 4, the driver of the car, is in accordance with other circumstances and probabilities of the case. As already indicated, the rough plan prepared by the Police Officer, the correctness of which is not questioned, itself indicates that it was the bus which went to its wrong side and attacked the car. Therefore, the conclusion of the Court below that the accident was due to the negligence on the part of the driver of the bus has to be accepte.

6. Regarding the question of quantum, it is not contended, as far as the injured are concerned, that the Court below erred in fixing the compensation. Small amounts have been awarded to the four injured and they have not been questioned,

7. However, as far as the damage to the car is concerned, the contention of the owner of the bus is that the claim is a very exaggerated one and the Court below has decreed the entire claim without proper scrutiny. The car is said to be 1955-year model Studebaker. The owner of the car claimed that he purchased the car in the year 1966 for a sum of Rs. 10,000. Exhibit A-3 dated 1st November, 1966 is said to be the receipt given by one M.A. Hayum, the previous owner of the car for a sum of Rs. 10,000. Admittedly, the car had passed several hands before it came to the present owner. The owner of the car has not placed the best evidence in respect of the price that he has actually paid for the same. Significantly, the previous owner of the car who is said to to have passed the receipt, Exhibit A-3, has not been examined. The matter rests only on the evidence of the owner himself as P.W. 1. When the best evidence that should be available has not been placed, I think it is not safe to accept the evidence of P.W. 1. regarding the price for which he had purchased the car.

8. Assuming that he had paid a sum of Rs. 10,000 for the car on 1st November, 1966, the question is whether he is entitled to a compensation of a total sum of Rs 11,000. It is claimed that if the car is to be repaired, a sum of Rs. 9,000 is required and that as the vehicle had been immobalised due to the accident, there was loss incurred (as the car had been run as a taxi) to the extent of Rs. 2,000. That is how the total claim of Rs. 11,000 is made up. It is not the case of the owner of the car that he actually repaired the vehicle. He has only produced certain papers said to be estimates for the repair of the car given by two workshops. Exhibit A-10 dated 29th March, 1968 is said to be an estimate given by Raman and Raman (P,) Ltd., Tanjavur. Exhibit A-11 dated 10th April, 1968, is said to be an estimate given by Akbar Automobiles, Madurai. In Exhibit A-11 it is stated that the spare parts to be used for repairing the car would cost Rs. 5,000 and the labour charges would be Rs. 4000. In Exhibit A-10 only the labour charges are indicated at Rs. 4500 but estimate regarding the cost of the

spare parts to be used for repairing the car is given. The Court below has rejected the evidence of the owner of the car regarding Exhibit A-11 said to be the estimate given by Akbar Automobiles, Madurai. It has given sufficient reasons to hold that Exhibit A-11 is not a genuine document and no reliance can be placed on the same. That view of the Court below is not questioned before me.

9. So, one is left with Exhibit A-10, the estimate given by Raman and Raman (P.) Ltd., Thanjavur. The significant fact is that none from Raman and Raman (P.) Ltd. has been examined to prove Exhibit A-10. The same has been produced only by the owner of the car (P.W.1). As none from Raman and Raman (P.) Ltd., has been called as a witness, I do not think the figure in Exhibit A-10 can be accepted *ipso facto*. Even otherwise, as it is not claimed by P.W.1 the owner of the bus, that he actually repaired the car and spent the sum as indicated in Exhibit A-10. All that is on record is that P.W.1 got an estimate as per Exhibit A-10 for repairing the car. As the car itself has not been repaired, I do not think it is proper to hold that the owner of the car is entitled to a sum of Rs. 9,000 as compensation for the damage to the car, especially when Exhibit A-10 itself gives the estimate only regarding labour charges of Rs. 4,500 and nothing is mentioned about the value of the spare parts to be used.

10. However, it cannot be gainsaid that the car had been badly damaged. The accident being a head-on collision, the front part of the car had been very much damaged—bumper, grill, radiator, mud-guards and head lights had been smashed. The position of the engine has also changed though there is nothing to show that the engine itself had been otherwise damaged.

11. Whatever that be, as the owner of the car has not given evidence of having repaired the car and spent any amount in that respect, the proper compensation payable would be the difference between the value of the car as on the date of the accident and the scrap value of the vehicle after the accident. As the car is said to have been purchased, even as per P.W.1, for a sum of Rs. 10,000 in 1966, it cannot be worth anything more than Rs. 8,000 as on the date of the accident, the date being 21st December, 1967, more than one year after purchase of the car. The ear having been used as a taxi should have worn out very much after it was purchased by P.W.1. Therefore, even accepting the case of P.W.1 that he paid a sum of Rs. 10,000 for the car, as on the date of the accident the value of the same cannot exceed a sum of Rs. 8 000. Considering the fact that only the front part of the car had been damaged, and that too there is no evidence to show that the engine itself had been damaged, I believe, even as a scrap, the vehicle would be worth Rs. 3,000. I say so because the several other parts of the car which had not been affected, can be sold for a reasonable price. Under such circumstances, I think the proper compensation payable for the damages to the car itself is only Rs. 5,000.

12. Regarding the loss of income, the claim is exaggerated. As already seen, the claim is for a sum of Rs. 2,000. On the evidence before the Court, I think it is safe to hold that the loss of income was only Rs. 1,000. Therefore, the total compensation payable to the owner of the car is only Rs. 6,000.

13. The only remaining question is whether the Court is right in exonerating the insurer. Now, it is not disputed that the person who drove the bus was only Murugayyan. It is further not in dispute that the said Murugayyan did not have a licence to drive a heavy motor vehicle. Undoubtedly, the bus in question is a heavy motor vehicle. That means, the person who drove the bus did not have a licence to drive the said vehicle. In the policy issued by the insurer, there is a condition that the policy would cover an accident only if the person who drives the vehicle holds a licence to drive the same. I will extract the very words and they are as follows:

> "Provided that the person driving holds a licence to drive the motor vehicle or has held and is not disqualified for holding or obtaining such a licence."

As it is not in dispute that Murugayyan did not hold a licence to drive a heavy motor vehicle such as the bus which was covered by the said policy, as per the above condition of the policy, the insurer cannot be made liable.

14. It is contended on behalf of the owner of the vehicle that in view of the decision of the Supreme Court in *New Asiatic Insurance Co., Ltd.* v. *Pessumal Dhamal Aswani and others*[1] the abovesaid condition in the policy cannot be taken advantage of by the insurer to shove off its liability. In that case, the car belonging to one Aswani was given to one Pessumal who drove the car. One of the conditions in the policy was that if the driver of the car was entitled to benefits under any other policy, the policy issued in favour of Aswani would not be available. Pessumal had the benefit of some other policy. The Supreme Court held that such a condition would not debar the third party claimant from claiming compensation from the insurer. At page 1741 the Supreme Court observed:

> "Thus the contract between the insured and the company may not provide for all the liabilities which the company has to undertake *vis-a-vis* the third parties, in view of the provisions of the Act. We are of opinion that once the company had undertaken liability to third parties incurred by the persons specified in the policy, the third parties' right to recover any amount under or by virtue of the provisions of the Act is not affected by any conditions in the policy. Considering this aspect of the terms of the policy, it is reasonable to conclude that proviso (*a*) of para. 3 of section II is a mere condition affecting the rights of the insured who effected the policy and the persons to whom the cover of the policy was extended by the company, and does not come in the way of third parties' claim against the company on account of its claim against a person specified in para. 3 as one to whom cover of the policy was extended."

1. (1964) 2 Comp.L.J. 83: 34 Comp Cas. 693: (1964) 2 S.C.J. 428: (1964) 7 S.C.R. 867: A.I.R. 1964 S.C. 1736.

The decision has no application to the facts of the present case because the condition in the policy covering the vehicle in the present case is a statutory condition. In other words the Motor Vehicles Act contemplates the insurer to exclude the cover of the policy in case the vehicle is driven by a person who does not hold a licence to drive the particular vehicle.

15. In section 96 (2) (*b*) (ii) of the Motor Vehicles Act, 1939, it is provided that the insurer can issue a policy subject to a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who had been disqualified for holding or obtaining a driving licence during the period of disqualification. The insurer in this case has availed of this statutory provision and inserted the particular condition in the policy. Therefore it is not open to contend that the insurer should not have been exonerated, even if the third party claimants press the claim against the insurer.

16. But, in the case before the Supreme Court, the condition, as seen above, is not one contemplated under the statute. It is under such circumstances, the Supreme Court held that is not open to the insurer as against the claims by third parties to contend that because of the said condition between it and the insured, it is exonerated regarding the claims made by the third parties.

17. Further in the present case, the third party claimants do not press their claim against the insurer. It is the owner of the bus who is a party to the contract of insurance, who says that the insurer should be made liable for the compensation payable to the third party claimants Whether the condition in the policy is one contemplated in the statute or not, the insured being a party to the contract cannot be heard, to say that the terms of the contract are not to govern the rights of the parties.

18. *Chanchalben* v. *Shailesh Kumar Pandurang Thakore*[1], is a decision by the Gujarat

1. 1974 A.C.J. 393.

High Court and that was a case where the driver held a licence to drive the vehicle in question though it was a learner's licence. Therefore, that decision has no application to the present case. In the decisions in *B. Appa Rao* v. *Dunna Mukunda Rao*[1] and *The New India Assurance Co. Ltd.* v. *Srikanta Ghose*[2], on facts it had been found that it had not been established that the person who drove the vehicle did not have a licence to drive that vehicle. Therefore, these cases also are of no help in deciding the present case.

19. The result is that the revision petitions are dismissed. But the appeal A. S. No. 348 of 1972, is partly allowed in that the total compensation payable to Mohammed Ebrahim, the plaintiff in O. S. No. 73 of 1969, is only Rs. 6,000 (rupees six thousand only). I direct the parties do bear their respective costs in this Court.

R.S. —— *Petitions dismissed.*
Appeal partly allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

P.V. Chinniah Goundar .. *Appellant**

v.

P. Ponnusamy and another
.. *Respondents.*

Evidence Act (I of 1872), section 116—Scope of—Plaintiff encroaching on and occupying road poramboke—B memo. issued—Defendant in possession of another portion—Lease by defendant in favour of plaintiff—Eviction proceedings against plaintiff—Eviction ordered—Plaintiff granted time to vacate—Municipality becoming owner of leased portion—Permission by Municipality to plaintiff to occupy—Suit for declaration and injunction—Plaintiff entitled to decree.

The plaintiff had encroached on a road poramboke and was running a tea shop. He took on lease from the defendant land adjoining his, which again was road poramboke on which the defendant had encroached and was in occupation. The defendant instituted eviction proceedings in respect of the leased land. Eviction was ordered and the plaintiff was given time to vacate. The leased land was originally poramboke belonging to Government and was subsequently assigned to Manapparai Municipality. The Municipality had permitted the plaintiff to occupy the same. The plaintiff, therefore, filed a suit for a declaration that he was entitled to remain in possession and for injunction. His suit was dismissed in the lower Courts. On second appeal,

Held: Since as between the Municipality and the defendant-lessor the title to the suit property was yet to be decided, it was not open to the plaintiff-tenant without surrendering possession to deny the title of his lessor.

[*Para.* 4.]

Cases referred to:—

Guruswami Nadar v. *Ranganahan*, (1953) 2 M.L.J. 511 : I.L.R. (1954) Mad 341 : A.I.R. 1954 Mad. 402; *Krishnamurthy v. Tambaram Panchayat*, (1970) 1 M.L.J. 444 : 82 L.W. 683.

Appeal against the decree of the District Court, Tiruchirapalli, in Appeal Suit No. 652 of 1972, preferred against the decree of the Court of the District Munsif of Kulithalai in Original Suit No. 836 of 1970.

S. Kothandarama Nayanar and *V. Srinivasan*, for Appellant.

E. Padmanathan, for Respondents.

The Court delivered the following

JUDGMENT:— The plaintiff who was unsuccessful in both the Courts below has come up by way of this second appeal. The short facts are as follows:—He has filed O.S. No. 836 of 1970 before the Court of the District Munsif, Kulithalai, for a declaration that he is entitled to remain in possession of the suit property and also for an injunction. According to him, the suit property is a road poramboke comprised in S.F. No. 583 situate in Manapparai Town. This was shown as A.B.C.D., in the plaint plan. The plaintiff

1. (1973) A.C.J. 222.
2. (1972) A.C.J. 153.

*S. A. No. 2442 of 1975. 16th March, 1976.

encroached upon this suit item in about 1949 or 1950 and was running a tea shop. By issue of B memos., his right to remain in possession has been recognised by the Government of Tamil Nadu. The portion marked as A.E.F.G., situated on the north of the suit item was a private property of the first defendant, the second defendant being the power-of-attorney agent of the first defendant. The portion shown as E.B.H.F., is situated north of the suit item and east of A.E.F.G. This portion is a road poramboke. The first defendant was in possession of this portion E.B.H.F. Since the plaintiff wanted additional accommodation, he took the property situated on the north of the suit item for lease from the first defendant. The defendants instituted eviction proceedings in respect of the portion leased to the plaintiff shown as A.B.H.G. Eviction was ordered which was sustained even in appeal. The plaintiff was granted time till 10th August, 1970. Under the cover of those proceedings, the plaintiff was sought to be evicted. The property which was leased out in favour of the plaintiff by the defendants being originally poramboke belonging to the Government, by reason of the assignment in favour of the Municipality, the Municipality had become the owner. The said Municipality had given permission by its orders dated 12th June, 1969 and 20th July, 1970 to the plaintiff to occupy the suit item. Hence, the rights of the plaintiff had been protected and, therefore, he instituted the suit.

2. In defence it was contended that the entire property including the suit item was enjoyed by the first defendant who encroached upon the property notwithstanding the same being Government poramboke, So long as the plaintiff was inducted into possession by means of a tenancy agreement from the defendants, it was not open to him to deny their title.

3. The defence was accepted. Hence the learned District Munsif dismissed the suit. On appeal in A.S. No. 652 of 1972, the learned District Judge of Tiruchirapalli dismissed the appeal upholding the judgment of the trial Court. Hence the present second appeal.

4. It is the contention of Mr. S. Kothandarama Nayanar, learned counsel for the appellant, that the Courts below erred in their construction of section 116 of the Evidence Act. According to him, it is not correct to hold that the plaintiff without surrendering possession of the property could not deny the title of the defendants. Having regard to the fact that the property originally belonged to the Government, being a poramboke, which came to be assigned in favour of Manapparai Municipality and further having regard to the fact that the said Municipality had granted permission to the plaintiff to remain on the property, it was well open to him to set up title in the paramount title holder, *viz.*, the Municipality. In support of his contention, the learned counsel relied on the decision in *Guruswami Nadar* v. *Ranganathan*[1] and *Krishnamurthy* v. *Tambaram Panchayat*[2] I am unable to accept the argument of the learned counsel for the appellant. In *Guruswami Nadar* v. *Ranganathan*[1] in interpreting section 116 of the Evidence Act at Page 514 it was held:

> "But it is now well-settled that the duration of the estoppel continues so long as the tenant has not openly restored possession by surrender to his landlord".

However, what the learned counsel would urge is a sentence which occurs lower down to the effect "from this, the exception follows that it is open to the tenant even without surrendering possession to show that since the date of the tenancy, the title of the landlord came to an end or that he was evicted by a paramount title-holder or that even though there was no actual eviction or dispossession from the property, under a threat of eviction he had attorned to the paramount title-holder.", which will apply to him. In the case on hand for the exception to apply, none of the factors as stated therein at all have arisen. Therefore, the absolute rule quoted above would apply. *Krishnamurthy* v. *Tambaram Panchayat*[2], is the judgment of Palaniswamy, J., wherein the learned Judge has held:

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1. (1953) 2 M.L.J. 511: I.L.R. (1954) Mad. 341: A.I.R. 1954 Mad. 402.

2. (1970) 1 M.L.J. 444: 82 L.W. 683.

"The rule of estoppel laid down under section 116 of the Evidence Act is not absolute. It is well-settled that where the true owner evicts the tenant let into possession by another, the tenant could attorn to the true owner and set up his title in answer to a suit filed by the landlord who let him in possession. The only limitation is that so long as the tenancy is subsisting the tenant is not entitled to set up a *jus terti* in a third person. Where the tenant is evicted from possession by the true owner, the tenancy comes to an end and there is nothing in law to prevent the tenant from attorning to the true owner. In such cases it is not necessary that the eviction of the tenant should be by actual dispossession. If the true owner is armed with a legal process for eviction, which cannot be lawfully resisted, even though the tenant is not put physically out of possession, it would in law amount to eviction. The question whether there was a threat of eviction and whether that threat was sufficient in law to make the tenant attorn to the person putting forward the threat has to be decided upon the facts and circumstances of each case".

Here again, those circumstances which the learnd Judge pointed out have not arisen. As between the Municipality and the defendants, the title is yet to be decided. Consequently, I see no reason to disagree with the concurrent findings of the Courts below.

5. The second appeal will, therefore, stand dismissed. There will be no order as to costs. No leave.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

R. Ranganathan ... *Petitioner**

v.

Veerakumar Trading Chit Funds Private, Ltd. (In Liquidation) represented by the Official Liquidator, High Court, Madras, and others .. *Respondents.*

Companies Act (I of 1956), section 537—Scope and Applicability—Decree against Company—Subsequent winding up—Sale in execution of decree without leave of Court—Sale void.

In order that a decree obtained in a suit filed against a company may be binding on the Official Liquidator, leave will have to be obtained by the decree-holder to continue the proceedings under section 446 of the Companies Act, 1956, or the corresponding section 171 of the Old Companies Act of 1913. When sale has taken place without the leave of Court, section 537 will have its full force.

[*Para* 4.]

Case referred to:—

Bansidhar Shankarlal v. *Mohd. Ibrahim and another*, (1971) 41 Comp. Cases 21: (1971) Tax. L.R. 740: (1971) 2 S.C.R. 476: A.I.R. 1971 S.C. 1292.

Petition under section 25 of the Provincial Small Causes Court Act praying the High Court to revise the order of the Court of the Subordinate Judge, Coimbatore, dated 15th April, 1975 and made in E.A. No. 201 of 1974 in E.P. No. 359 of 1973 in S.C. No. 721 of 1972.

S. Nainar Sundaram, for Petitioner.

Official Liquidator, for first Respondent.

The Court made the following

ORDER:—This revision is directed against the order of the learned Second Additional Subordinate Judge of Coimbatore,

* C.R.P. No. 1175 of 1975.

9th January, 1976.

passed in E.A. No. 201 of 1974 in E.P. No. 359 of 1973 in S.C. No. 721 of 1972 whereunder the relief to the Official Liquidator to hold that the sale held on 28th February, 1974 without the leave of the Court was void and to direct respondents 2 to 4 to restore to the petitioner the assets purchased by them in the sale held on 28th February, 1974, was granted.

2. The short facts are as follows:— Veerakumar Trading and Chit Funds, Private, Limited, was directed to be woundup by an order of this Court passed in Company Petition No. 13 of 1971 on 18th August 1973. Prior to this S.C. No. 721 of 1972 was filed by the revision petitioner (R. Ranganathan). On 23rd December, 1972 he attached the immoveable properties belonging to the company under liquidation. The small cause suit resulted in a decree on 22nd February, 1972. As seen above the order of winding up was passed on 18th August, 1973 It is rather unfortunate that the decree-holder did not obtain the leave of the Court as required under section 537 of the Companies Act (hereinafter referred to as the Act). It may be because he was ignorant of the winding up proceedings. The sale of certain movables belonging to the Company under liquidation took place on 28th February, 1974 which resulted in realisation of a sum of Rs. 2,700 odd and less poundage the net proceeds realised was Rs. 2,567.50. Out of that amount Rs. 1,777.20 was paid over to the decree-holder. Under these circumstances, E.A. No. 201 of 1974 was taken out and the learned Subordinate Judge allowed that petition.

3. Mr. Nainar Sundaram, learned counsel, would submit before me that under section 446 though leave is required to continue the proceedings against the Official Liquidator, the failure to obtain leave would not be fatal to the proceedings nor do the proceedings become void on that score. For this submission he places reliance upon the decision of the Supreme Court reported in *Bansidhar Shankarlal* v. *Mohd. Ibrahim and another*[1] In the submission of the learned counsel, the same principle must be made applicable to acts arising under section 537 also.

4. These submissions are repelled by the learned Official Liquidator by contending that under section 537 there is no escape for the revision—petitioner because the words occurring under that section are "shall be void". I have little hesitation in upholding the contention of the learned Official Liquidator. *Bansidhar Shankarlal* v. *Mohan Ibrahim and another*[1] dealt with a situation arising under the Old Companies Act and even otherwise that case is of no assistance to the revision petitioner. In order that a decree may be binding upon an Official Liquidator leave will have to be obtained to continue the proceedings under section 446 or the corresponding section under the Old Companies Act of 1913, *viz.* section 171. But the situation here is very different. The sale had undoubtedly taken place without the leave of the Court. In such a case, section 537 will have its full force. As rightly contended by the learned Official Liquidator there is no escape from the imperative language of that section which says that the sale shall be void. Therefore, I am unable to see any error in the order of the Court below. Hence I hold that there are no merits in this civil revision petition which shall stand dismissed. However I make it clear that the attachment, as noted from the above facts, was long before the order of winding up was made. If that be so, there cannot be any valid objection to the attachment being continued. Though normally speaking the effect of setting aside the sale by the learned Subordinate Judge and my upholding that order would mean that the *status quo ante* should be restored, inasmuch as what were the subject-matter of the sale were only movables, I do not think it is necessary to direct the maintenance of *status quo ante*. Instead, the entire sale proceeds will be paid over to the Official Liquidator. As seen above, a sum of Rs. 1,777.20 has been paid over to the decree-holder-revision petitioner. It will be paid back by him to the Official Liquidator within two months from

1. (1971) 41 Comp. Cas. 21: (1971) Tax. L.R. 740: (1971) 2 S.C.R. 476: A.I.R. 1971 S.C. 1292.

1. (1971) 4 Comp. Cas. 21: (1971) 2 S.C.R 476: (1971) Tax. L.R. 740: A.I.R. 1971 S.C. 1292.

today. It is needless for me to state that the balance lying to the credit of the small cause suit (S. C. No. 721 of 1972) will also be paid on to the Official Liquidator.

5. It is further represented by the learned Official Liquidator that pursuant to the attachment certain other moveables not forming the subject-matter of the execution were handed over to the decree-holder. Concerning them, undoubtedly *status quo ante* can be restored. Therefore, I hereby direct the revision petitioner to hand over all those moveables not forming the subject-matter of the sale in E.P. No. 359 of 1973 (S.C. No. 721 of 1972) to the Official Liquidator within two months from today. However, the attachment of the decree-holder will continue. With these observations, the civil revision petition shall stand dismissed. However, I make no order as to costs.

R.S. *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Sethuraman, J.*

Alagammal .. *Appellant**

v.

M. S. Rajagopala Servai .. *Respondents.*

Specific Relief Act (*XLVII of* 1963), *section* 16, Explanation —*Suit for specific performance—Plaintiff to plead readiness and willingness to perform the contract—Actual tender of money not essential.*

Under the *Explanation* to section 16 (*c*), Specific Relief Act, where a contract involves the payment of money, it is not essential for the plaintiff to actully tender to the defendant or to deposit in Court the money except when so directed by the Court. It will suffice if he avers performance of, or readiness and willingness to perform, the contract according to its true construction. [*Para.* 6.]

Cases referred to :

International Contractors Limited v. *Prasanta Kumar*, (1961) 3 S.C.R. 579 : A.I.R. 1962 S.C. 77; *Eswari Amma* v. *M. K. Korah*, (1972) 1 M.L.J. 218 : 85 L.W. 239 : A.I.R. 1972 Mad. 339; *Bahadur* v. *Motiram*, A.I.R. 1972 Raj. 250.

* S.A. No. 1327 of 1972, 5*th November*, 1975.

Appeal against the decree of the Subordinate Judge, Sivaganga in Appeal Suit No. 113 of 1970, preferred against the decree of the Court of the District Munsif of Sivaganga in Original Suit No. 77 of 1968.

S. Rajaram, for Appellant.

K. Rajasekharan and *R. Ramaswami*, for Respondent.

The Court delivered the following

JUDGMENT.—The defendant is the appellant. The plaintiff filed a suit for specific performance of an agreement to reconvey the suit properties and for costs. The plaintiff sold the suit properties to the defendant for a sum of Rs. 800 on 23rd July, 1965 under Exhibit B-1. It was registered on 24th July, 1965. On that date, there was an agreement of reconveyance entered into between the same parties whereby the defendant agreed to reconvey the suit properties to the plaintiff within a period of 2 1/2 years from the date of the said agreement on receipt of a sum of Rs. 1,375. This agreement of reconveyance has been marked as Exhibit A-1. On the basis of this agreement, the plaintiff called upon the defendant on 29th September, 1967 to execute a reconveyance deed for the sum of Rs. 1,375 and offered to pay the said sum. But the defendant replied refusing the said offer. The plaintiff, therefore, came forward with the suit for specific performance.

2. The defendant raised substantially two contentions. The first contention was that the period fixed was not 2 1/2 years but only two years and that the offer to pay and the notice calling upon the defendant to reconvey were after the period of two years and, therefore, not valid. The second contention was that there was no proper tender of the amount at any time.

3. The learned District Munsif, who tried the suit, held that the first contention that, the plea that instead of 2 1/2 years, the period was two years was not open

to the defendant in view of section 92 of the Indian Evidence Act. On the second contention, he held that there was proper tender. He, therefore, decreed the suit as prayed for.

4. The defendant appealed and before the learned Subordinate Judge, no argument was advanced on the question as to whether the period of 2 1/2 years in Exhibit A-1 was cut down to two years later on. The learned Judge examined the only contention that was advanced before him regarding the tender. Following the decision of the Supreme Court in *International Contractors Limited* v. *Prasanta Kumar*[1], he held that there was a valid tender in the present case. In his view, when in the reply notice there was a repudiation of the agreement, there was a clear indication on the part of the defendant that if money was tendered, it would have been refused. He, therefore, considered that it could be clearly held in this case that the failure to tender the actual amount was not fatal. He thus concurred with the view of the learned District Munsif on this point. The appeal thus failed.

5. In the present appeal, the learned counsel for the appellant submitted that the period was cut down to two years after Exhibit A-1. Having regard to the fact that this argument was not pressed at the earlier stage and taking into account the valid reasons given by the learned District Munsif for rejecting this contention, I do not think that this point survives for consideration at this stage. The only point that now requires to be examined is whether the plaintiff actually produced the money at the time when he filed the suit on 23rd January, 1968. He deposited the money into Court on 24th February, 1968. There is no dispute about the deposit.

6. Section 16 (*c*) of the Specific Relief Act, provides that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. There is an explanation to the said provision which provides that where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court. The plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. The scope of this provision has been considered in a Bench decision of this Court reported in *Eswari Amma* v. *M. K. Korah*[1]. It was pointed out that in a suit for specific performance the plaintiff must aver in his plaint that he was ready and willing to perform his part of the contract and if the averment was traversed, he must prove the said averment. In pleading his readiness and willingness, it is not necessary for the plaintiff to produce the money. In the present case, the written statement was filed on 21st March, 1968 while the deposit had already been made on 24th February, 1968. Thus, even before the averment was traversed, the plaintiff deposited the amount into Court. The plaintiff has done everything necessary to comply with the provisions of section 16 of the Specific Relief Act in the present case.

7. The learned counsel for the appellant drew my attention to a decision of the Rajasthan High Court in *Bahadur* v. *Motiram*[2], as supporting his stand. I have carefully gone through the said decision and I find that the view of the learned single Judge in that case is not anything inconsistent with the Bench decision of this Court. In that case, oral evidence was let in to show that the plaintiff had tendered the sale price of Rs. 1,000 to the defendant on the stipulated date. But this evidence was found to be unsatisfactory and not reliable by both the Courts. Therefore, the learned Judge accepted this finding and held that the plaintiff having failed to perform strictly his part of the contract was guilty of the breach of the terms of the

1. (1961) 3 S.C.R. 579 : A.I.R. 1962 S.C. 77.

1. (1972) 1 M.L.J. 218 : 85 L.W. 239 ; A.I.R. 1972 Mad. 339.
2. A.I.R. 1972 Raj. 250.

agreement and cannot, therefore, claim specific performance. Though in paragraph 8 of the said judgment, there are some observations which appear *prima facie* to support the appellant, still I think that the said observations have to be considered in the particular context of the facts of that case. At any rate, having regard to the Bench decision of this Court, the decision of the Rajasthan High Court will not be applicable here. In the circumstances, there is no merit in the second appeal and it is, accordingly dismissed. There will be no order as to costs. No leave.

R.S. — *Second appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*S. Mohan, J.*

The Management of Dhanalakshmi Mills Pvt. Ltd., Tirupur represented by its Manager .. *Petitioner**

v.

T. V. Balakrishnan and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), *section* 11 (a)—*Non-employment of staff member—Industrial dispute—Award against management—Validity of award —, Section* 11 (a) *only prospective—Enquiry officer attesting evidence of witness not opposed to natural justice and enquiry not biased—Award questioned—*Certiorari—*Constitution of India* (1950), *Article* 226.

A dispute was referred to the Labour Court on the non-employment of a staff member of the petitioner-management. That Court passed an award against the management holding that section 11 (*a*) of the Industrial Disputes Act of 1947, was retrospective and that the enquiry officer had attested the evidence of the witnesses and therefore was biased. The management filed a petition to quash the award.

Held, (1) Section 11 (*a*) of the Act is only prospective in its character.

There was no basis for charging the Enquiry Officer with bias.

(2) In W.A. No. 600 of 1969, it had been held that even evidence procured by the General Manager himself would not constitute violation of the principles of natural justice. In the instant case, it was not found anywhere in the award that the enquiry was otherwise biased or was unfair. The judgment in W.A. No. 600 of 1969 would squarely apply to this case. [*Para.* 5.]

Case referred to :—

Workmen of Assam Match Co., Ltd. v. *Labour Court*, (1973) 2 L.L.J. 279.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records from the 2nd respondent, the Labour Court, Coimbatore, and quash its award in I.D.No. 139 of 1971 dated 30th May, 1972 (Exhibit "A") and published in the Tamil Nadu Government Gazette dated 12th July, 1972 Supplement to part II section 1 at page 7.

A. Ramachandran, for Petitioner.

K. Ramachandran, for 1st Respondent.

The Court made the following

ORDER.—This writ petition is to quash the order of the Labour Court passed in I.D. No. 139 of 1971, dated 30th May, 1972. The short facts are as follows:

In G.O. Rt. No. 2030, Labour Department dated 1st October, 1971, the question that was referred to the Labour Court for adjudication was, whether the non-employment of Thiru T. V. Balakrishnan (the first respondent) was justified and if not, to what relief he was entitled. The first respondent was in the employment of the writ petitioner from March, 1959 as a staff member, as an assistant clerk, who was later promoted as a Provident Fund and E. S. A. clerk. He was dismissed from service

* W.P. No. 2044 of 1972. 10th February, 1976.

for certain alleged misconduct from 15th March, 1968 as per clause 19 (*b*) and (*k*) of the standing order of the mills after enquiry. Contending that the dismissal was improper, he raised the dispute and prayed that he might be reinstated with back—wages. In the counter of the management, it was contended that there had been a proper and valid enquiry and in fact, notwithstanding the proper opportunities being afforded to the workman, he did not choose to participate in the enquiry and, therefore, it had to be proceeded *ex parte*. No exception could be taken to the procedure adopted during the domestic enquiry and the dismissal was valid and proper. There were criminal proceedings wherein he was found guilty. However, that judgment was set aside on appeal by the District and Sessions Judge, Coimbatore and an appeal against the acquittal had also been filed to this Court.

2. The Labour Court held: (1) section 11 (*a*) of the Industrial Disputes Act of 1947, hereinafter referred to as the Act, was retrospective in its character; (2) The enquiry Officer was the person, who attested the evidence of the witnesses and, therefore, there was bias in the enquiry. After holding so it proceeded to examine the entire evidence and came to the conclusion that the non-employment was not justified. However, instead of an order of reinstatement, it ordered compensation of nine months' wages in lieu of reinstatement computing the sum into Rs. 2,745.

3. Mr. A. Ramachandran, learned counsel in attacking the award submits as under:

1. The finding of the Labour Court that section 11 (*a*) of the Act is retrospective in its character is directly opposed to the decision of the Supreme Court in *Workmen of Assam Match Co., Ltd.* v. *Labour Court*[1].

2. Merely because the enquiry officer attested the statements of the witnesses, it would not amount to bias. (*vide* W.A. No. 600 of 1969 E.I.D. Parry Limited—Appellant *v.* 1, S. M. Gangadharan, 2. The Presiding Officer, Labour Court, Madras, Respondents.)

3. There is no finding anywhere that the conclusion arrived at the domestic enquiry was in any way perverse and, therefore without recording such finding, the Labour Court was not justified in appraising the evidence. Added to this, the criminal appeal which was stated to be pending at that time before the Labour Court has now ended in conviction of the first respondent, in Crl.As. Nos. 1184, 1055 and 1053 of 1970—State by the Public Prosecutor—Appellant in all the appeals *v.* T. V. Balakrishnan, Respondent in all the appeals (Accused)—and that judgment has to be given due weight.

4. Mr. K. Ramachandran, learned counsel for the workmen would submit that no doubt it is not correct to hold that section 11 (*a*) of the Act is retrospective in its character and he fairly conceded that that part of the award is wrong. He, further, concedes that the Labour Court was not justified in reappraising the evidence. But having regard to the fact that it had rendered a finding that the enquiry was biassed, this is a fit case in which the Labour Court should be directed to re-consider the matter which could also take note of the judgment in Crl. A. Nos. 1184, 1055 and 1053 of 1970. According to him W.A. No. 600 of 1969 is applicable inasmuch as in that case, the evidence was procured by the General Manager whereas here actually he had attested the statements of the witnesses.

5. On a careful consideration of the above arguments, I have little hesitation in holding that the impugned award is liable to be set aside for more than one reason.

1. The decision in *Workmen of Assam Match Co., Ltd.* v. *Labour Court*[1], is the authority for the proposition that section 11 (*a*) of the Act is only prospective in its character. Therefore, that part of the award is clearly in correct in law.

1. (1973) 2 L.L.J. 279.

1. (1973) 2 L.L.J. 279.

2. The finding of the Labour Court in paragraph 6 of its award relating to bias, is based on the simple ground that the enquiry officer was an attestor and this is the reason why it states:

> "So, even without going into any other fact or taking into account it can be straightaway stated that Thiru N. V. Krishna Iyer, should be taken to be biased and he is not competent to enquire into his matter."

In W.A. No. 600 of 1969 the Division Bench held that in a case wherein the evidence is procured by the General Manager himself it would not constitute violation of principles of natural justice. Of course, it added that if nothing more appears on record to show bias and unfairness or arbitrariness. In this case that is the reason that I have quoted the award of the Labour Court in its own words. I do not find anywhere in it that the enquiry was otherwise biased or was unfair. Therefore, the judgment in W.A. No 600 of 1969 would squarely apply to this case. It is the categoric stand of the management that when the enquiry was commenced the workmen did not ask for any adjournment to produce documents and, therefore, to characterise the conduct of the management as the Labour Court did, that the management should have impressed upon the claimant that the management could not furnish him with the copies but he could try to get those copies from the postal department if it is possible and get ready for the enquiry but, "on the other hand, the enquiry Officer straightaway started the enquiry and examined the head clerk" is not correct. Mr. K. Ramachandran, would, however, urge that the workman did want an adjournment. I find no basis for this argument in the award of the Labour Court. Nowhere it is stated that he asked for adjournment and it was refused. On the contrary what the Labour Court would hold is as is seen above as if it is the duty of the management to inform the workmen about the non-availablity of the records; if really the workman was interested he ought to have taken steps to procure those records or summon the same. Certainly, it was not the duty of the management to impress about the necessity of producing those records or to remind the workman of his duty. Therefore, this part of the award is also clearly vitiated.

6. The last straw on the camel's back appears to be the judgment of Krishnaswami Reddy, J., in Crl. A. Nos. 1184, 1055 and 1053 of 1970. The learned Judge has convicted the workman. I make it clear that I am not basing my conclusion on this criminal appeal and this is the reason why I say that happens to be the last straw on the back of the camel. There is absolutely no necessity to remand this matter. Having regard to the discussion above, by no stretch of imagination could it be held that the domestic enquiry was in any way biased or improperly conducted nor could the findings be characterised as perverse. Consequently, this writ petition will stand allowed and the *rule nisi* is made absolute. I make no order as to costs.

S.J. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

C. V. Krishna .. *Appellant**

v.

State of Madras by the Commissioner of Milk Production, Madhavaram, Madras .. *Respondent.*

Arbitration—clause in contract—Arbitrator named—Application for the appointment of arbitrator other than the named arbitrator—When can be granted—Court has discretion to disturb the named arbitrator—Indian Arbitration Act (X of 1940), section 34.

If the parties to a contract voluntarily incorporated as one of its terms a clause which obligates one or the other of them to refer disputes arising under it or to seek for an interpretation of the terms of such a contract to or from an arbitrator specified or named by them, then the mandate imposed upon themselves by the

* Appeal No. 370 of 1972. 15*th March*, 1976.

parties is inescapable and has to be given effect to. An exception is where it is proved and established that the person specified as arbitrator is biased towards one of the parties or has involved himself in the subject-matter of the contract from its inception and during the course of its working giving rise to a reasonable impression that a reference to him would be futile and not be a means to secure justice. In such a case the parties can seek from the Court appointment of an arbitrator other than the named one. [*Para.* 4.]

As has been pointed out by the Supreme Court, the strict principle of sanctity of contract is subject to the discretion of the Court under section 34 of the Indian Arbitration Act, for there must be read with every such agreement an implied term or condition that it would be enforceable only if the Court having due regard to the other surrounding circumstances thinks fit in its discretion to enforce it and that it is obvious that a party may be released from the bargain if he can show that the selected arbitrator is likely to show bias or by sufficient reason that he will not act fairly or that he has been guilty of continued unreasonable conduct. The Courts are slow to disturb the named arbitrator. But at the same time, the Courts have the right to decide in their judicial discretion whether all such terms contained in an arbitration agreement are to be enforced or not. There may be circumstances in a given case wherein, as stated by the Supreme Court a party may be released from the bargain, if circumstances exist to justify such conclusion. [*Paras.* 4 & 7.]

Cases referred to:—

K. Yusuf Sheriff v. *Akbar Sheriff*, (1975) 88 L.W. 516 : A.I.R. 1976 Mad. 3 ; *Uttar Pradesh Co-operative Federation* v. *Sunder Brothers, Delhi*, A.I.R. 1967 S.C. 249.

Appeal against the decree of the Court of the Subordinate Judge, Chingleput, dated 28th July, 1971, in Original Suit No. 41 of 1968.

R. Kunchithapatham and *M. R. Krishna Iyer*, for Appellant.

K. M. Srirangan, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The plaintiff is the appellant. He filed a suit (it is called a suit because of convention) for a direction to the defendant to file the arbitration agreement contained in a contract entered into between himself and the defendant in connection with the supply of an insulated milk tanker made of stainless steel. He also prayed for a reference to an arbitrator other than the arbitrator named in the arbitration agreement, who was to be appointed by the Court in this suit so as to decide the disputed matters as between the contracting parties. The suit arose this way. On 26th June, 1964, the defendant invited tenders under Exhibit A-1 for the supply of the milk tanker and such an invitation made it clear that the price was to be exclusive of sales tax. Under Exhibit B-1 dated 29th July, 1964 the plaintiff tendered and quoted a price of Rs. 35,000. This was accepted under Exhibit B-2 dated 25th August, 1964 and the plaintiff was directed to supply the tanker within 60 days from 24th October, 1964 and he was also directed to pay a security deposit of Rs. 4,500. The plaintiff initially committed default in the matter of the supply of the tanker within the prescribed time. It appears, therefore, that under Exhibit A-2 dated 28th December, 1965 the order placed by the plaintiff and later accepted by the defendant, was cancelled. But it also appears from the record and the supervening events, which are not disputed before us, that the plaintiff was given yet another opportunity to supply the tanker, though in point of time earlier to such a decision the security deposit of Rs. 4,500 was also forfeited by the defendant. Finally, by revoking the earlier order of cancellation of the order the plaintiff was given an opportunity under Exhibit A-3 dated 10th March, 1966 to supply the tanker by 30th April, 1966, but the records disclose that such supply was not made even within that time. Now it transpires that the plaintiff finally delivered the tanker in or about December, 1966 which is said to have been accepted by the defendants, on 10th December, 1966. The plaintiff raised a bill Exhibit B-3 for such supply and claimed a sum of Rs. 38,850 which included a sum of Rs. 3,850 as and towards the sales tax.

Curiously enough the plaintiff received a cheque for Rs. 15,000 on 10th May, 1967 with a note appended to it to the effect that the said amount was in full settlement of his bill Exbihit B-3. The plaintiff accepted the said cheque under protest and called upon the defendant to submit the disputes, which had arisen by then to arbitration. We may here mention that it is not disputed that under clause 19 of Exhibit A-1 or B-1 any difference or dispute arising out of the interpretation or application of the terms of the contract, as entered into between the plaintiff and the defendant shall be referred to the Milk Commissioner for an award and such reference shall be deemed to be a submission to the arbitration within the meaning of the provisions of the Indian Arbitration Act, 1940, and the parties agreed that the award of the Milk Commissioner shall be final and binding on the parties. The plaintiff apparently foreseeing and having felt that differences had arisen not only in the matter of the interpretation but also the applicability of the clauses in the contract either under Exhibit A-1 or Exhibit B-1, wanted such disputes to be referred to arbitration. He sought for such a reference by issuing notices Exhibits B-4, B-5 and B-6. The plaintiff was confronted with a reply under Exhibit A-4 which reads as follows:

"MADRAS DAIRY AND MILK PROJECT.

From

The Commissioner for Milk Production and Livestock Development,
Milk Colony, Madhavaram,
Madras-51.

To

Thiru M. R. Krishna Iyer,
Advocate, No. 12-A, Aziz
Nagar 1st Street,
Kodambakkam, Madras 24.

R.O.C. No. 28638/E1/64, dated 21st October, 1967.

Sir,

Sub: Supply of Stainless Steel Milk Tank - Settlement of Bill - delay - regarding.

Ref: Your letter dated 5th October, 1967.

With reference to your letter cited, I am to inform you that orders of the Government in the matter have since been received and further action is being pursued to settle your client's affairs, at a very early date."

The plaintiff became apprehensive and he, therefore, filed the present action seeking for the reliefs already mentioned. The defendant in his written statement after traversing the merits and complaining that the tank was defective, stated thus in paragraph 6 of the written statement:

"6. The following three matters had to be considered and a decision arrived:

(i) Forfeiture clauses:

(ii) Liquidated damages for delay in supply, and

(iii) the difference in value.

All these arose because of the delay of plaintiff not completing the terms of contract as per agreement. It was finally decided by the Government that 1 and 2 above have to be enforced and this was pending correspondence between both the parties. The plaintiff is not entitled for any interest, as such delays are incidental and inherent in the contract and was pending consideration and correspondence between parties. The plaintiff has been paid in full the amount due to him and no amount is payable by the defendant."

He particularly objects to the plaintiff's request for appointment of an arbitrator other than the one named in the arbitration agreement and would ultimately claim that the claim made by the plaintiff in this action is excessive and that the suit has to be dismissed.

2. The following issues were framed by the learned Subordinate Judge of Chingleput.

1. Has the defendant shown any sufficient reason why he should not be required to file the arbitration agreement?

2. Is not the applicant entitled to get an order for appointment of an independent arbitrator? and,

3. To what relief, is the plaintiff entitled?

No oral evidence was adduced by the parties. After referring to the documentary evidence, the learned trial Judge dismissed the suit with costs. It is as against this, the present appeal has been filed.

3. Mr. Srinivasa Varadachari, learned counsel for the appellant says that the suit ought not to have been dismissed and the Court had no option left except to refer the subject-matter to an arbitrator whether to the named arbitrator or to an independent arbitrator as the case may be, but the dismissal of the suit with costs is against law. What is urged by the learned Government Pleader is that there is sufficient hypothesis in the pleadings to infer that the plaintiff was not inclined to submit the matters in dispute to the named arbitrator and as the plaintiff cannot avoid such an arbitrator having agreed to do so when the contract was forged, the dismissal of the suit was right.

4. We are unable to agree with the conclusion of the learned Subordinate Judge. There was no argument before us as was attempted in the written statement that the suit has not been properly framed. It is by now clear that if the parties to a contract voluntarily incorporated as one of its terms a clause which obligates one or the other of them to refer such disputes, arising under it or to seek for an interpretation of the terms of such a contract to or from an arbitrator specified or named by them, then the mandate imposed upon themselves by the parties is inescapable and has to be given effect to. To this general principle there is an exception. If it is satisfactorily proved and established that the person named or specified as the arbitrator under the contract, is biased towards one of the parties or the arbitrator overtly or covertly involved himself in the subject-matter of the contract from the time of its inception and during the course of its working so as to give an impression to a reasonable person that a reference to him of the disputes that have arisen between the parties in relation to the contract would be futile and in the ultimate anlysis would not be a means to secure justice to the complaining party, then the Courts have carved out an excepion to the general application of the mandate as above and has allowed parties to come to Court to seek for the appointment of an arbitrator other than the named arbitrator before whom the differences between the parties could be laid for final adjudication. In *U.P. Co-operativeFederation* v. *Sunder Bros.,Delhi*[1], this principle has been recognised. The Supreme Court said that the strict principle of sanctity of contract is subject to the discretion of the Court under section 34 of the Indian Arbitration Act, for there must be read with every such agreement an implied term or condition that it would be enforceable only if the Court having due regard to the other surrounding circumstances thinks fit in its discretion to enforce it and that it is obvious that a party may be released from the bargain if he can show that the selected arbitrator is likely to show bias or by sufficient reason to suspect that he will act unfairly or that he has been guilty of continued unreasonable conduct. In a recent judgment of a division Bench of our Court, the above decision was in *K.Yusuf Sheriff* v. *Abkar Sheriff*[2], referred to. In the latter case, the named arbitrator was the husband of one of the partners, Veeraswami, CJ., speaking for the Bench said that it cannot be assumed from mere relationship that the arbitrator would act otherwise than impartially. Obviously that was a case where there was no iota of evidence to found a suspicion as against the neutrality of the arbitrator.

5. With the above background we shall look into the facts of this case. When a cheque for Rs. 15,000 was sent on 10th May, 1967 in full settlement of the bill Exhibit B-3 raised by the plaintiff demanding a sum of Rs. 38,850 certainly a dispute has arisen. The plaintiff was pursuing the demand and was anxious to know how a sum of Rs. 15,000 could be an equation for Rs. 38,850. This he did when he sent the notices Exhibits B-4, B-5 and B-6. He gets a reply which has already been excerpted whereunder the Milk Commissioner, who is the named arbitrator under the agreement Exhibit A-1 or Exhibit B-1 states that orders of the Government have since been received

1. A.I.R. 1967 S.C. 249.
2. (1975) 88 L.W. 516: A.I.R. 1976 Mad. 3.

and further action is being pursued to settle the plaintiff's affairs. Pursuant to this, a cheque for Rs. 17,575 is sent once again in full settlement but without any explanation. When the plaintiff came to Court the defendant in paragraph 6 of the written statement which was also excerpted above has categorically pleaded that it was finally decided by the Government that the forfeiture clause and the clauses relating to the liquidated damages for delay in supply and the difference in value have to be enforced. Obviously, the plaintiff's apprehension that the view of the arbitrator who is to settle disputes has abdicated his power and has surrendered himself to the opinion of a third party is not without foundation. Therefore, it is clear that this apprehension in the mind of the plaintiff was responsible for the second relief asked for by him in the suit.

6. In the above circumstances, when the contract is not in dispute, when the terms of the contract are not equally disputed and when, under clause 19 of the agreement an aggrieved party can refer the current disputes under it to the arbitrator named or otherwise, then the defendant cannot under the terms of the contract itself or otherwise, refuse to accede to the request of the plaintiff to bring the arbitration agreement into Court for judicial scrutiny.

7. The next question is whether the second relief asked for by the plaintiff, namely, to appoint an arbitrator other than the named arbitrator (Milk Commissioner) is well founded. No doubt the pleading is rather expressive in this case and even so Exhibit A-4 dated 21st October, 1967. These two circumstances provoked the plaintiff, rightly in our view, to contend that the Milk Commissioner, who is the named arbitrator under the contract, ought not to function as such, as he has surrendered his judgment to the Government and made it appear that he was merely an automation to implement the same. But the question is whether the Government did decide at all as pleaded in para.6 of the written statement and if so what was the nature of the decision and what was the occasion for the decision. These facts and records relating to them were not placed before the trial Court. Even the trial Judge would say that there is nothing on record to show that the Government have issued any instruction to the Milk Commissioner to act in a particular manner. At the appellate stage, the learned Government Pleader before us is unable to improve matters. In this state of affairs, we are unable to apply the exception to the general rule referred to above and straightaway disturb the named arbitrator and impose another instead, on the parties. As already stated, the Courts are too slow to disturb the named arbitrator. But at the same time, the Courts have the right to decide in its judicial discretion whether all such terms contained in an arbitration agreement are to be enforced or not. There may be circumstances in a given case wherein, as stated by the Supreme Court a party may be released from the bargain, if circumstances do exist to justify such a conclusion. As there is not enough material before us, nay even before the trial Court for it to conclude that the named arbitrator ought not to function in the particular case, we are unable to, at present, to grant the second relief asked for by the plaintiff. We have already stated that the apprehensions of the plaintiff are not without any foundation. Be that as it may, the matter has to be looked into by the trial Court and for this purpose, the finding of the Court below that the plaintiff is not entitled to the second relief has to be set aside.

8. We have already expressed that the plaintiff is as of right enitled to call the defendant to file the arbitration agreement into Court. We have also stated that the question whether the arbitrator named under Exhibit A-1 or Exhibit B-1 should be the Tribunal who should decide the disputes that have arisen between the parties under the contract or not, is a matter to be decided by the trial Court after hearing the parties and after giving an opportunity to the parties to call for such records as are necessary to decide the issue.

9. In the circumstances, the dismissal of the suit is wrong, the judgment and decree of the trial Court are reversed and while decreeing the suit in so far as the first relief is concerned, the subject-matter is remitted to the trial Court for a decision

on the second relief asked for by the plaintiff.

10. Having regard to the delay with which the plaintiff is also confronted with, the trial Court shall dispose of the matter within one month after the re-opening of the Courts and see that the parties produce all such necessary records in time so as to enable it to complete the trial. Costs, costs in the cause.

R.S. ——— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Mohan, J.*

Kuttan Pillai .. *Appellant**

v.

Ammamuthu and another .. *Respondents.*

Mortgage—Redemption —Othi of land formerly lying in Travancore State—Application for settlement of debts under Travancore Debt Relief Act (II of 1116 *M.E.), section* 16—*Applicability of Act to othi and effect—Inaction of Official Receiver—Impact, if any—Death of mortgagor—Sale of mortgaged property by his children with direction to redeem othi—Sale, if valid*—Locus standi *of purchaser to redeem—Transfer of Property Act (IV of* 1882), *section* 91—*Plaintiff cannot abandon his case, adopt that of defendant and claim relief.*

One *T* created an othi in favour of the first defendant in 1932, over an extent of 72 cents of garden land lying formerly in Travancore State. *T* filed a petition on 22nd August, 1942 for settlement of his debts under the Travancore Debt Relief Act (II of 1116 M.E., 1940). In lieu of the one-fourth share of property to which *T* would be entitled under the Act, on recourse to it for settlement of his debts, he was allotted 19 cents of land which, after his death in 1949, was sold to the plaintiff by his children. Later still, on 2nd February, 1963, the latter sold to the plaintiff the remaining 53 cents of land as well, with a direction to redeem the othi. Accordingly, in June, 1965 the plaintiff sought to redeem the othi. The defendant resisted his claim to redeem on the ground that, on recourse to the Travancore Debt Relief Act, (which according to him, was applicable to othis also), for the settlement of his debts by *T*, apart from the one-fourth share which under the Act was to be allotted to the applicant the remaining three-fourth vested in the Official Receiver for realisation and distribution among the creditors and, therefore, *T*, and after his death his children, had no interest in such three-fourths which could be conveyed by the latter to the plaintiff so as to give him *locus standi* to redeem the othi.

Held : The Travancore Debt Relief Act (II of 1116 M.E.) applied to usfructuary morgages also subject to certain exceptions noted in the Act itself. [*Para.* 13.]

When an application is made by a debtor under section 16 of the Act it is because the debtor is unable to meet the claims of his creditors. He surrenders all his properties whereupon an order being passed, there is a statutory conversion of the properties and 25 per cent. there of (not exceeding Rs. 3,000 and homestead wherever possible) is to be allotted in favour of the debtor and the rest is for distribution among his creditors. In view of this there can be no intention on the part of the debtor-mortgagor to keep alive the mortgage in the instant case and make provision in regard to other debts only. [*Para.* 18.]

The applicant's assets as above vest in the official receiver for the adjustment of the claims of creditors. The Travancore Act is very different from insolvency proceedings. The proceedings under the Insolvency Act will not be applicable in full vigour to the proceedings under the Travancore Act. [*Paras.* 18 *and* 25.]

Upon the passing of the order under the Travancore Act, if there is a legal vesting, even though for the purpose of administration, the title to the properties cannot continue in the mortgagor (debtor) and his heirs could not convey a valid title, in the instant case, in favour of the plaintiff. [*Para.* 21.]

This legal position is not obliterated by the passage of time or by inaction of the Official Receiver, [*Para.* 21.]

* S.A. No. 682 of 1972. 2nd *April*, 1975.

The plaintiff is not a person interested within section 91 of the Transfer of Property Act and he will not be entitled to redeem the othi. [*Para.* 22.]

In view of the plaintiff claiming adversely to the official receiver as shown by his definite case that on *T's* filing a petition under section 16 of the Travancore Act there was no vesting in the Official Receiver, it is not open to the plaintiff to urge that there could-be a decree in favour of the official receiver. It is not open to a plaintiff to abandon his own case, adopt that of the defendant and claim relief on that footing. [*Para.* 25.]

Cases referred to :—

Padmanabha Pillai v. *Chacko*, (1943) T.L.R. 1219 ; *Fruit and Vegetable Merchants Union* v. *Delhi Improvement Trust*, 1957 S.C.J. 167 : (1957) S.C.R. 1 : A.I.R. 1957 S.C. 344; *Parvathi Amma* v. *Ease Yohanan*, A.I R. 1955 T.C. 241 ; *Sankaran* v. *Kochukutty*, (1953) K.L.T. 883: A.I.R. 1954 T.C.259; *Sekharan* v. *Kochukutty*, I.L.R. (1953) T.C. 633 : A.I.R. 1953 T.C. 591 ; *Subbaiah* v. *Ramaswami*, I.L.R. (1954) Mad. 80 : (1953) 2 M.L.J. 766 : A.I.R. 1954 Mad. 604 ; *Govindaraj* v. *Kandaswami Goundar*, (1956) 2 M.L.J. 578 : I.L.R. (1957) Mad. 1245 : 69 L.W. 977 : A.I.R. 1957 Mad. 186.

Appeal against the decree of the Court of the Subordinate Judge, Nagercoil in Appeal Suit No. 49 of 1971, preferred against the decree of the Court of the District Munsif of Kuzhithurai in Original Suit No. 192 of 1967.

R. Gopalaswami Ayyangar and *K. Sreekumaran Nair*, for Appellant.

S. Padmanabhan, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant in this second appeal. The short facts are as follows :—

2. Survey No. 769 of Arumana village consists of 4 acres and 86 cents of garden lands. Originally it belonged to one M. Thanuvan. He created an othi over an extent of 72 cents under Exhibit A-1, dated 30th November, 1932 in favour of the first defendant, Ammamuthu. Thanuvan died in 1949. Thereafter, Thanuvan's children sold 53 cents under Exhibit A-2, dated 2nd February, 1963 in favour of the plaintiff (KuttanPillai) with a direction to redeem the othi, Exhibit A-1. Therefore, he issued a notice to the first defendant, Exhibit A-3, dated 30th of June, 1965 seeking to redeem, Exhibit A-1 othi. To this, it was replied under Exhibit A-5 dated 9th of July, 1965 stating that the plaintiff was not entitled to redeem, in view of the petition filed by Thanuvan under the Travancore Debt Relief Act (II of 1116 M.E., 1940) (hereinafter referred to as the Act).Hence, O.S. No. 192 of 1967 was preferred in the District Munsif's Court, Kuzhithurai.

3. In the written statement, the mortgagee contended as follows : Thanuvan, before his death, filed the petition Exhibit B-1, dated 22nd August, 1942 under the Act. The effect of that petition would be to vest all the properties of Thanuvan (debtor) in the Official Receiver. In lieu of his 1/4th share, he was allotted 19 cents, which 19 cents were sold in favour of Kutty Nadar, under Exhibit B-2, dated 1st February, 1960 by the children of Thanuvan. Therefore, what was sold in favour of the plaintiff was only 53 cents, *i.e.*, 72 cents being the subject-matter of the othi, out of which 19 cents having been sold in favour of Kutty Nadar. After the proceedings under the Act, Thanuvan had no title and therefore, Exhibit A-2 would be void. That being the position the plaintiff will have no right to redeem.

4. The learned District Munsif decreed the suit holding that the proceedings under the Act, did not have the effect of vesting the property of Thanuvan, since no action was taken thereon. Consequently, the plaintiff would be entitled to redeem the mortgage. Thus a decree for redemption was granted.

5. On appeal in A.S. No. 49 of 1971, the learned Subordinate Judge, Nagercoil, reversed the findings of the trial Court and held that after the proceedings under the Act, there was no title which remained with Thanuvan and therefore, Exhibit A-2, did not convey valid title and the plaintiff will not be entitled to redeem.

6. Mr.R. Gopalaswami Iyengar, learned counsel for the appellant, strenuously contends before me that the lower Appel-

late Court was not justified in reversing the judgment of the trial Court, especially when nothing more was done, excepting to pass a paper order, in the proceedings under the Act. Having regard to the scheme of the Act, usufructuary mortgages are exempted from the operation of the Act and consequently, the proceedings under the Act would have no effect at all. It is the further submission of the learned counsel that the effect of the proceedings under the Act would not convert the assets of the debtor, and in such a case, it would be open to the purchaser, as a co-owner, to redeem the property.

7. By virtue of section 91 of the Transfer of Property Act, it would be open to the plaintiff, as a person interested in the redemption of the mortgage and it does not lie in the mouth of the mortgagee (first defendant) to say that the plaintiff cannot redeem. Even accepting the stand of the mortgagee, the Official Receiver will undoubtedly, be entitled to redeem it. Inasmuch as he is a party, either a joint decree for redemption or a decree for redemption in favour of the Official Receiver may be passed.

8. Mr. S. Padmanabhan, learned counsel for the 1st Respondent in reply submits that there is a vital difference between the proceedings under the Act and the general insolvency proceedings. Where a debtor files an application under the Act, the effect of that would be to vest all the properties in the Official Receiver. In the instant case, he, having been allotted 19 cents, which 19 cents form the subject-matter of Exhibit B-2, it can no longer be contended that the proceedings under the Act, were of no effect. It is incorrect to contend that the Act does not apply to usufructuary mortgages. That has been decided in his favour by a decision of the Travancore-Cochin High Court. Inasmuch as no valid title had been conveyed in favour of the plaintiff, he cannot be a person interested within the meaning of section 91 of the Transfer of Property Act and, therefore, no decree for redemption can arise in his favour. Nor, can a decree be passed in favour of the Official Receiver, since not only the Official Receiver has remained *ex-parte*, but the claim of the plaintiff himself is adverse to that of the Official Receiver.

9. I may state that in support of the respective submissions, both the learned counsel referred to many authorities and it is not necessary to refer to them at this stage, since I am considering them below.

10. For a proper appreciation of the respective contentions, it would be worthwhile to formulate the following questions, which arise for determination in this case:

(1) Whether the Act (The Travancore Debt Relief Act) (Act II of 1116 ME) applies to usufructuary mortgages ?

(2) What is the effect of presenting a petition under the Act ?

(3) What is the extent and the scope of applicability of insolvency law to such petitions presented under the Act ?

(4) Since the Official Receiver is a party to these proceedings, can at least a decree be passed in his favour ?

(1) Whether the Act applies to usufructuary mortgages ?

Section 5 (1) of the Act reads as follows:—

> "Except in the cases mentioned hereunder, nothing contained in this Act, shall affect any usufructuary mortgage.
>
> *Exceptions.*—(*a*) Any transaction which purports to be ususfructuary mortgage but which is proved to have been intended to be or treated only as a hypothecation.
>
> (*b*) A claim by the mortgagee whether arising under a decree or otherwise for recovery of the mortgage amount."

The definition of 'usufructuary mortgage' is contained under section 2 (*ix*) of the Act. Section 3 is as follows:—

> "(1) subject to the provisions of sections 4 to 7, this Act shall apply to all debts incurred before the 23rd day of Dhanu 1112 and subsisting at the commencement of this Act.
>
> (2) Notwithstanding anything contained in sub-section (1) or sections 4, 5 and 6 the provisions of sections 18, 19, 20, 21 and 23 shall, subject to the provisions of section 7, apply to all classes of debts whether incurred before, on or after the 23rd Dhanu 1112",

11. In the instant case, the mortgage, Exhibit A-1, is dated 15-4-1108 (M.E.) (30th November, 1932). By referring to sections 5 (1) and 3 (1), Mr. R. Gopalaswami Iyengar, would contend that the Act would be inapplicable to Exhibit A-1, Othi while Mr. Padmanabhan, would state that such a construction does not take note of the exceptions provided under section 5 (1) and also sub-section (2) of section 3.

12. Instead of myself embarking upon an enquiry as to the correctness of the respective contentions, I need only base my conclusion on the ruling of the Full Bench of the Travancore High Court in *Padmanabha Pillai* v. *Chacko*[1]:

> "The other argument for the appellant was that the usufructuary mortgagee goes out of the section and that he cannot be affected by the Act or by section 19. This is an over statement of the true position. Section 3 (2) puts out of sections 18 to 21 and 23, the class of debts exempted under section 4. It is wrong to say that the Crown debts and debts of a similar kind are exempted from the operation of the proceedings under section 19. They too come in. The proceedings are for a *full* settlement of all debts. Crown debts etc., secured debts, unsecured debts all come in for settlement under section 19. As pointed out above secured debts are to be paid in full as far as possible. Crown debts etc., left unsecured are next to be paid and next come simple money debts to be discharged *pro rata*. Hence, we hold that in view of the specific provisions of section 19, usufructuary mortgages do come within the administration under section 19. Section 4 is obviously controlled by section 3, clause (2) and not *vice versa*."

at page 1228:

> "The first difficulty is whether a usufructuary mortgage is excluded. The learned Advocate-General contended for the appellant that a usufructuary mortgage was excluded from the Acts for all purposes. Section 3 (2) provides (in simplified language) that, notwithstanding anything contained in sections 4, 5 and 6, and subject to an exception the provisions as to insolvency (omitting sections 16 and 17) shall apply to all classes of debts whenever incurred. If section 3 could be regarded as referring only to the time when the debt was incurred, as is suggested by the marginal note, it might be fairly simple to construe, but the excepted sections deal both with time (*see* section 4 (*k*)) and various classes of debts. Section 5 provides that nothing in the Act shall affect any usufructuary mortgage, subject to exceptions which are not immediately relevant. The joint effect of these provisions appears to be that the quasi-insolvency proceedings are to apply to a debt whenever incurred, notwithstanding that nothing in the Act affects a usufructuary mortgage, and therefore notwithstanding that the debt is secured by a usufructuary mortgage. The opposite construction could be justified by various provisions in the relevant sections; notably the omission of section 16 which refers to debts, from section 3 (2), thus leaving the exclusion of usufructuary mortgages from the provisions of section 16 intact, save for the reference in sections 16 (3) (*c*) to mortgages, and the fact that section 16 (1) contemplates a "full" settlement of debts and a comparison of the word "claim" in sections 5 (1) (*b*), 16 (3) (*b*) and 18. But this construction might result in the debt being included in the Acts and the security being excluded. Such an aberration from insolvency practice was presumably not intended, particularly as provision is made for the payment of secured creditors, by the second proviso to section 19. Thus while this conclusion cannot be described as free from doubt, I think the true meaning of the sections is that usufructuary mortgages are within the quasi-insolvency proceedings. On this point I am fully in agreement with the learned Chief Justice."

at page 1237:

> "Whether a usufructuary mortgage is also subject to the administration under sections 16 to 20 is a point which depends upon the answer to the question whether the entire assets include securities or not. In the view that has been taken of

1. (1943) T.L.R. 1219 at 1226.

the meaning of the entire assets, the conclusion seems obvious. That conclusion is reinforced by the provisions for full settlement of his debts and for distribution by making over to the creditors the remaining assets after payment of all liabilities by way of public, revenue tax, cess, fee rent, jenmikarom or such other dues chargeable by virtue of any enactment for the time being in force, and also by the succeeding provisions that the secured creditors shall rank in preference to the unsecured creditors in the order of mutual priority. Secured creditors include both usufructuary and simple mortgagees. In the absence of anything to the contrary (and there is much for it in section 3 (2)) it must be assumed that the usufructuary mortgagees like simple mortgagees are also roped in for the settlement of the liabilities of the debtor in the course of the administration."

13. Consequently, in view of the above decision, there is, therefore, no difficulty in holding that the Act applies to the usufructuary mortgages also, subject, of course, to the exceptions noted in the Act itself.

14. For the sake of convenience, question No. 2, (What is the effect of presenting a petition under the Act?) and question No. 3, (What is the extent and the scope of applicability of insolvency law to such petitions presented under the Act?) may be dealt with together.

15. According to Mr. Gopalaswami Iyengar, a reading of sections 16 to 19 of the Act, would make it clear that there is no vesting of the properties in the Official Receiver. The properties of the erstwhile debtor are taken possession of for the purpose of settlement of the liabilities of the debtor, in the manner provided under section 19, and notwithstanding the presentation of the application under section 16, the debtor continues to have the title to the properties and this is made clear since section 18 says that the procedure prescribed under the Travancore Insolvency Act shall *mutatis mutandis* be applicable to such proceedings. In support of this contention, the learned counsel relies on the decision in *Fruit and Vegetable Merchants Union v. Delhi Improvement Trust*[1], *Parvathi Amma v. Easo Yohannan*[2], and also Letters Patent Appeal No. 2 of 1968.

16. For contra, it is argued by Mr. Padmanabhan, that once an application is presented under section 16 of the Act, there is a vesting of the properties in the Official Receiver and the debtor cannot claim to be the owner of the properties, since under section 19 (*a*), 1/4th of the entire assets not exceeding Rs. 3,000 is allotted in favour of the debtor, to which alone he will be entitled and the rest being available for distribution among the creditors. It is only the procedure as is applicable under the Insolvency Act that is made applicable to the proceedings under this Act. But, there is a great deal of difference between the Insolvency Act and this Act, since there is no question of an order of discharge or annulment. Nor anything against the above 1/4th is available to the debtor under the insolvency proceedings. The learned counsel places reliance on *Sankaran v. Kochukutty*[3].

17. Before I proceed to deal with the respective submissions, it may be necessary to refer to the Press Communique, dated 16th September, 1940 which provides the necessary background for appreciating the scope of the various provisions of the Act. Hence, I am extracting the same.

18. One noteworthy feature of this Act is that the benefits conferred by it are designedly made applicable to such debtors as are willing to discharge their liabilities by depositing at least a portion of the debt in half-yearly instalments. Debts repaid within a period of 2 years will be reduced to 70 per cent. of the total amount while those paid within 6 years will be reduced to 75 per cent. and those repaid within 9 years will be reduced to 80 per cent. It is further provided that in determining the amount of a decree-debt for purpose of payment, not more than one-half of the principal in the case of money debts and not more than the principal in

1. 1957 S.C.J. 167 : 1957 S.C.R. 1 : A.I.R. 1957 S.C. 344 at 353.
2. A.I.R. 1955 Trav.-Co. 241.
3. (1953) K.L.T. 883: A.I.R. 1954 T.C. 259.

the case of paddy debts will be payable towards interest up to the date of the decree and not more than a like amount will be payable towards interest from the date of the decree. From the date of the commencement of this Act no future interest exceeding simple interest at 4 per cent. in the case of paddy debts could be charged. Provision is also made for the setting aside in certain cases, of sales of immovable properties in execution of a decree. If, for payment towards a decree-debt; one-third of the amount payable under the decree is deposited within six months from the date of the commencement of the Act and the balance sufficient to make up 70 per cent. of the amount payable under the decree is deposited within a further period of six months, the sale will be set aside. In the case of persons unable to pay the debts provision has been made for settlement of liabilities by Court under which the debtor will make available to his creditors 75 per cent. of the assets reserving to himself 25 per cent. of such assets but so as not to exceed Rs. 3,000 in value. Where a person, therefore, files an application under sections 16, it is because, he is unable to meet the claims of his creditors. He surrenders all the properties whereupon an order being passed, there is a statutory conversion of those assets. 25 per cent. (not exceeding Rs. 3,000 and homestead, wherever possible) to be allotted in favour of the debtor and the rest of the 75 per cent. for distribution among the creditors. In such a case, it is impossible to state that there would have been any intention on the part of the mortgagor (debtor) to keep alive the mortgage, in the instant case Exhibit A-1 and make provision only with regard to the other debts. The presentation of the petition would necessarily include and, in fact did include, the othi debt, under Exhibit A-1. Mr. Gopalaswami Iyengar, is not correct in his submission that the properties are taken possession of by the Official Receiver without there being vesting for the purpose of the adjustment of the claims. Nor again do I find any force in the argument that the proceedings under the Insolvency Act would be applicable in full vigour to the proceedings under this Act. The proper construction to be placed on sections 16 to 19 of the Act should be as laid down by the Full Bench in *Padmanabha Pillai v. Chacko*[1]:

"The object of the provisions is for a full settlement of his debts. The method of proof (and not of administration by the Court) is the method prescribed by the Insolvency Act in such proceedings with necessary variations. The variations are assumed to be such as are consistent with the spirit and object of the Debt Relief Act. Under section 18, the Court shall first determine the admissibility and amount of each claim; and under section 19, the Court shall then settle the liabilities of the debtor in the manner mentioned therein after. It is in such settlement and as incidental thereto, that one-fourth of the entire assets has to be reserved, subject to necessary charges and limitations for the debtor. Such reservation is part of the settlement of liabilities and can be effected only at that stage. Having placed all his assets in the control of the Court, the debtor cannot immediately turn round, and even before the process of administration and settlement commences, demand a free one-fourth for his own; if at all, the statutory gift of one-fourth flames out of the embers of insolvency administration, and this can only be through the proceess of settlement of his liabilities. It may be unfair that an insolvent debtor should be given a statutory gift of one-fourth of his entire assets. But the policy of the Debt Relief Act is not the policy of the general insolvency law. Whereas the Insolvency Act was primarily designed for the protection of creditors, the Debt Relief Act intended that the debtor should not be uprooted and thrown over destitute, but that he should be maintained, if possible, rooted to the soil and with an opportunity to make a fresh start on a saving given to him out of the wreck. He is therefore given an one-fourth in due time in the course of the administration of his assets and of the settlement of his debts, subject only to the liabilities and limitations under section 19 (*a*)."

19. If this is the correct position, none of the decisions relied on by Mr. Gopala-

1. (1943) T.L.R. 1219 at 1235-1236.

swami Iyengar, *viz.*, *Fruit and Vegetable Merchants Union* v. *Delhi Improvement Trust*[1], *Parvathi Amma* v. *Easo Yohannan*[2], and Letters Patent Appeal No. 2 of 1968, will help him.

20. This apart, as rightly contended by Mr. S. Padmanabhan, there is neither an order of discharge, nor an annulment under the Act, unlike in the case of insolvency, and as seen above, there is a question of allotment of 1/4th in favour of the debtor under the insolvency proceedings.

21. As to the effect of filing a petition under section 16 of the Act, a Full Bench of the Travancore-Cochin High Court has held in *Sekharan* v. *Kochukutty*[3] :

> "If the debtor chooses to present an application properly under section 16, there is an automatic statutory conversion of all his assets into co-ownership property to be held by the Court and liable to be distributed by it among the co-owners who are the petitioner-debtor and his unsecured creditors, subject to the payment of the paramount liabilities and the satisfaction of the claims of secured creditors under section 19.
>
> The consequence of a proper presentation of an application by a debtor under section 16 being, as already stated, to statutorily convert the assets of the debtor into co-ownership property of himself and of all his unsecured creditors, the rights of the latter under the ordinary law to pursue their remedies by a suit and or execution of a decree and recover the moneys due are extinguished and in their stead is substituted a right to get a distributive share in the assets of the debtor. Those parties would have a decree extinguishing their existing rights and creating new rights instead, without anything done or any order passed by the Court."

From this it is clear that all the assets come into the hands of the Official Receiver and, therefore, it cannot be contended that the usufructuary mortgage still remained to be redeemed. But, having regard to the facts of this case, it is argued by Mr. Gopalaswami Iyengar, that nothing was done, in this case, no possession was taken, as seen from Exhibit A-6, the report of the Receiver, dated 8th December, 1949. The report says that there were no funds in the hands of the Receiver or in the treasury deposit, to enable the Receiver to meet the necessary expenses in connection with the giving of notice to all the creditors and inviting bidders for realising the assets by the sale of the property and he had requested the Court to pass necessary orders directing Thanuvan, the petitioner therein, to deposit a sum of Rs. 30. It is true that no steps were taken for the division of the property among the creditors, but it is important to note that Thanuvan surrendered all his properties and in lieu of his 1/4th share, he got 19 cents, which the children of Thanuvan sold under Exhibit B-2, dated 1st February, 1960 in favour of Kutty Nadar. But for this, they would not have had any right to this 19 cents. All the properties were surrendered by Thanuvan, when he filed the petition, Exhibit B-1. Therefore, the fact that the Official Receiver did not take possession cannot be highlighted and this is where the trial Court erred, while the lower Appellate Court had come to the correct conclusion. Hence, upon the passing of the order under the Act, if there is a legal vesting, even though for the purpose of administration, the title to the properties under Exhibit A-1 cannot continue in Thanuvan, in which event, his heirs could not convey a valid title in favour of the plaintiff, the present appellant.

22. This legal position is not obliterated either by the passage of time or by the so-called inaction on the part of the Official Receiver. This leads me to conclude that the plaintiff is not a person interested within section 91 of the Transfer of Property Act and, therefore, he will not be entitled to redeem the property.

23. Since the Official Receiver is a party to these proceedings, can atleast a decree be passed in his favour:—Mr. Gopalaswami

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1. 1957 S.C.J. 167 : A.I.R. 1957 S.C. 344 at 353.
2. A.I.R. 1955 Trav.-Co. 241.
3. I.L.R. (1953) T.C. 633 at 682 ; A.I.R. 1953 T.C. 591.

Iyengar, basing on *Subbaiah* v. *Ramaswami*[1], and Order 1, rule 10, Code of Civil Procedure, submits that a decree for redemption can be passed either jointly or at any rate, in favour of the Official Receiver, since he is a party to this proceeding, whereas Mr. Padmanabhan, submits that the claim of the petitioner is adverse to that of the Official Receiver and, therefore, there can be no question of a joint decree. Further, ther cannot be a decree for redemption by transposing the Official Receiver as a co-plaintiff, since the right of redemption presently is barred by limitation and by such an order, he will be highly prejudiced.

Subbaiah v. *Ramasuami*[1], is a case wherein it has been held as follows:

> "Pending a mortgage suit which was instituted on 9th October, 1931 and decreed on 5th December, 1931 a petition to adjudicate one of the mortgagors as insolvent was filed on 14th October, 1931. The adjudication was ordered on 19th February, 1932 and related back to the date of the petition. The mortgagee-decree-holder brought the properties to sale and purchased them himself on 21st March, 1935. Neither in the mortgage suit nor in the subsequent execution proceedings was the Official Receiver made a party. As the insolvent failed to apply for a discharge, the insolvency itself was annulled on 13th October, 1935 without making any vesting order.
>
> *Held:* The decree and execution proceedings were valid and binding on the insolvent."

24. It is true that the omission to implead the Official Receiver as a party to the mortgage action and the execution proceedings made the proceedings in effect against the property and such as not to bind the equity of redemption which vested in theReceiver or to make the sale valid so as to confer a title on the purchaser. But the decree and execution were not null and void in the sense that they had no legal existence at all. Under section 91 of the Transfer of Property Act, the mortgagor was a person entitled to redeem the property, and notwithstanding his insolvency and his having no interest in the mortgage security, he was a necessary and proper party to the action, under Order 34, rule 1, Code of Civil Procedure.

and at page 115:

> "Insolvency does not operate as civil death. The insolvent's property vests in the Official Receiver for the purpose of administering the estate and for meeting the claims of the creditors. The Act does not affect the capacity of the insolvent to enter into contracts and to otherwise deal with the property. He is in the position of a person who has alienated all his property or otherwise lost it. But his position cannot be equated to that of a minor or a lunatic. He can be sued with or without the leave of the Court as the case may be, and in that suit he can properly represent himself. But any decree that might be obtained against him would not bind the Official Receiver in whom his entire properties vest. If the properties vested in the Official Receiver are sold as if they were the properties of the insolvent, the sale would be valid and the judgment-debtor cannot question the validity of the sale. Such a sale would be analogous to a sale of the property of a third party as if it was the property of the judgment-debtor. The sale cannot be held to be a nullity or one made without jurisdiction."

25. Inasmuch as I have already held that the Act is very different from the Insolvency proceedings, the above observations will have no application to this case. No doubt, this is an authority for the proposition that in order to bind the Official Receiver, he must be necessarily impleaded as a party. But, that is very different from saying that notwithstanding the plaintiff claiming adversely to that of the Official Receiver, since it is his definite case that the properties did not vest in the Official Receiver, as a result of Exhibit B-1 petition, the plaintiff would be entitled to contend that there could be a decree is favour of the Official Receiver.

1. I.L.R. (1954) Mad. 80 : (1953) 2 M.L.J. 766 : A.I.R. 1954 Mad. 604.

As laid down in *Govindaraj* v. *Kandaswami Goundar*[1], the plaintiff cannot be allowed to abandon his own case, adopt that of the defendant and claim relief on that footing.

26. The learned counsel for the 1st respondent is right in his submission that the right of redemption had become barred, and therefore, immense prejudice would be caused, passing a decree in favour of the Official Receiver.

27. For all the above reasons, I am unable to disagree with the findings of the lower Appellate Court and hence, the second appeal is dismissed with costs. No leave.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

Bharat Trading (International) Ltd., with registered office at Gwalior and Branch Officer in Bombay by Power-holder A. P. Kaimal and another.
.. *Appellants**

v.

P. Nachiar Ammal and others.
.. *Respondents.*

(A) *Hindu Law—Joint Family business in senna leaves—Father-manager incurring debt —Death of father—Continuance of business by others—Creditors of business filing suits—Liability of heirs—Attachment before judgment of entire family property—Suit for partition by heirs of deceased ignoring attachment—Claim by son as class 1 heir under section* 6, *Hindu Succession Act (XXX of* 1956)—*Whether sons's share is liable to be proceeded against in execution of the decree.*

(B) *Hindu Succession Act* (*XXX of* 1956), *section* 6—*Scope of and applicability.*

The first paragraph of section 6 of the Hindu Succession Act shows, that the Act, does not affect the continuance of a coparcenary after the commencement of the Act. But the proviso to section 6 has made an inroad into the old orthodox law by making departure into the normal theory of survivorship. *Explanation 1* expands the expression "interest of a Hindu in a Mitakshara coparcenary". Under the *Explanation* the share which the class of heirs specified in the proviso would inherit would be that share in the coparcenary property that would have been allotted to the deceased member if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to partition or not. In a notional partition statutorily contemplated under the proviso read with *Explanation 1* to section 6, the interest of the deceased coparcener in the joint family devolves by succession, in the absence of testamentary disposition by the concerned member, on all the class I heirs mentioned in the proviso as above. All such heirs under the Act share such an interest of the deceased *per capita* and as tenants-in-common. Such statutory right to succeed creates, as it were, an independent proprietary interest in each of the statutory heirs in the property of the deceased member. Even though the quandom joint family may be continued for the purpose of orthodox Hindu Law and there is a manager or *kartha* in charge of the affairs of such joint family, yet such a manager or *kartha* cannot by reason of his peculiar position as such manager, contract debts or create obligations so as to bind the female members of the family specified as heirs in the proviso to the section or male heirs mentioned therein, as a matter of course. Such female members or male members classified therein, obtain such a statutory privilege, benefit, or right by reason of a fiction created under the Act. There may be cases, however, where the female members as above or the male members might have, either expressly or by necessary implication, participated in, or involved themselves in the affairs of the joint family or in the continuance of the joint family business or activity. Assuming that there was a joint family business and that was continued by the surviving members of the coparcenary, in all such cases, the female members or the male members specified in the proviso to section

1. (1956) 2 M.L.J. 578 at 584: I.L.R. (1957) Mad. 1245 : 69 L.W. 977 : A.I.R. 1957 Mad. 186.

*Appeal No. 526 of 1970.

23rd September, 1975.

6 other than such a *kartha* cannot be made liable for the debts incurred by such a *kartha* of the joint family or coparcenary without strict proof of participation or involvement of the female members or male-members other than the *kartha* in the said business. Such female members or heirs mentioned in the proviso might as obligors or parties to a particular contract or bargain voluntarily bind themselves to become liable along with the manager or *kartha*. This is a matter of proof. But it does not automatically follow that since there is a *kartha*, since there is a joint family business, the heirs who inherit the share of the deceased member of the coparcenary under the Act are coparceners and are to be automatically made liable for all the debts incurred by such *kartha* or manager.

[*Para.* 5.]

The estate which devolved on the classified heirs under the proviso to section 6 is one which is carved out of the joint family and is the independent and separate property of such heirs. The classified heirs would succeed by reason of the statutory privilege under the proviso to section 6 and the property cannot be dealt with without reference to them by the *kartha* of the family on the fact that he is continuing the joint family business for the benefit of the members of the joint family. [*Para.* 8.]

In order to make them liable in the eye of law it is necessary that there should be acceptable proof and enough material so as to make them liable for such debts incurred by the *kartha* in the course of the management of the joint family. The liability or the obligation to shoulder such responsibility would therefore depend upon the proof of the connection or nexus between the debt and the activity of the classified heir. If the female heirs or the other heirs as mentioned in the proviso to section 6 by reason of their conduct give a reasonable man the impression that they allowed the *kartha* to borrow, that they prompted the creditors to give on their assurances, and on their being joint promisors or obligors, then, they cannot escape liability. [*Para.* 9.]

Cases referred to :—

Veerasekara Varmarayar v. *Amirthavalliammal* (1974) 87 L.W. 397: A.I.R. 1975 Mad. 51; *Karuppa Goundar* v. *Palaniammal,* (1963) 1 M.L.J. 86: 76 L.W. 236: I.L.R. (1963) Mad. 434: A.I.R. 1963 Mad. 245; *P. Govinda Reddy* v. *Golla Obulamma,* (1971) 2 An.W.R. 43: (1971) 2 A.P.L.J. 231: (1971) 2 An.L.T. 97: A.I.R. 1971 A.P. 363.

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin, dated 23rd March, 1970 and passed in O.S. No. 17 of 1969.

S. Ramasubramaiam and *Ananda Rao*, for Appellants.

K. Hariharan, V. Meenakshisundaram and *K. Ramamoorthy*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The 6th and the 7th defendants who are the creditors of a quandom joint family consisting of one Palavesam Pillai, the first defendant and the plaintiffs in O.S. No. 17 of 1969 on the file of the Subordinates Judge, Tuticorin are the appellants. It is common ground that defendants 6 and 7 supplied on credit *senna* leaves to the first defendant who continued the family business of dealing in such leaves and in the course of such dealings, the first defendant as such manager of the joint family, became indebted. The result was that the 6th defendant filed O.S. No. 30 of 1967 and the 7th defendant filed O.S. No. 29 of 1967 as is seen from Exhibits B-19 and B-17 and obtained orders for attachment before judgment attaching all the family properties which devolved on the members of the family of Palavesam Pillai. Palavesam Pillai died on 14th September, 1958 as the father-member of the joint family and left behind him the first defendant, his son, who was the surviving coparcener and who continued the joint family business and the first plaintiff, his wife and defendants 2 to 5 his daughters. Consequent upon the attachment of the joint family properties in its entirety, the plaintiffs as class I heirs of Palavesam Pillai basing their entitlement on the rule of succession provided for in section 6 of the Hindu Succession Act, 1956, filed the present action for partition and separate possession of their shares in the suit properties which were, admittedly

by then attached in execution of the decree obtained by the appellants ignoring the attachment. The appellants' case was that the borrowing made by the first defendant as the person in management of the affairs of the joint family including the joint family business was for the benefit of the plaintiffs as well as members of such family and that therefore, they were equally liable to suffer attachment and pay the decree amount obtained by them in O.S.No. 29 of 1967 and O.S. No. 30 of 1967 on the file of the same Court. The plaintiffs' case is that they are not liable for the debts incurred by the first defendant after the death of Palavesam Pillai, and that even though he continued the joint family business as the surviving coparcener, the said debts incurred by him would not be binding upon their share of the suit properties which they obtained by reason of section 6 of the Hindu Succession Act. It is in that sense they filed the present action. Though in the plaint, as originally filed, the plaintiffs took up the position that the properties are not joint family properties yet, on 4th March, 1970, they admitted that the suit properties are ancestral properties and that they were claiming only their 5/12 share on the whole, *i.e.*, 1/12 to each of the plaintiffs. The 6th and the 7th defendants in their joint written statement pleaded that the borrowings were made by the first defendant for the benefit of the joint family and in connection with the joint family business and that the present suit for partition by the female members of the family is only to defeat and delay the creditors and that the debt is binding upon the plaintiffs and their share of the properties, as they got a benefit under the debt and in consequence they prayed for appropriate orders in the suit. The 1st defendant remained *ex parte*. We are not referring to the statements filed by the other defendants in the action as it is not necessary for us to do so. On such relevant pleadings, the trial Court framed the following issues:

(1) Whether the debts said to be due to defendants 2, 3, 4, 5, 6 and 7 are true, valid and binding upon the plaintiffs?

(2) Whether the debt due to the 8th defendant is binding upon the plaintiffs 3 to 5 ?

(3) Whether plaintiffs 3, 4 and 5 are estopped from questioning the binding nature of the debt due to the 8th defendant?

(4) Whether the 1st plaintiff is estopped from questioning the debt due to the defendants 2 and 3 ?

(5) What is the share to which the plaintiffs are entitled in the suit properties ?

(6) Whether in equity the properties in schedule to the written statement should be directed to be allotted to the share of the defendant ?

(7) Whether the 4th defendant is entitled to equity ? and

(8) To what relief, if any, are the plaintiffs entitled ?

2. While dealing with the binding nature of the debts incurred by the first defendant in favour of defendants 2, 3, 4 and 5, the lower Court said that the first plaintiff only is liable in respect of the debt incurred under Exhibits B-2 and B-3 which were in favour of defendants 2 and 3 and he founded such a liability on the ground that the 1st plaintiff attested Exhibits B-2 and B-3 which were registered mortgages executed by the first defendant in favour of the creditors of the family. He has also observed that neither the 1st plaintiff nor the other plaintiffs objected to the mortgage deed, at any time, during the course of the trial. As regards the other debts in favour of 4th, 5th and 8th defendants, the lower Court was of the view that the debt in favour of the 4th defendant was not binding. No doubt, the 4th defendant examined his debtor. That debt related to a mortgage evidenced by Exhibit B-15. The plaintiffs did not make any active part in the borrowing nor was any evidence let in to show that they acted as such. In those circumstances, the learned trial Judge negatived the plea of the 4th defendant that the share of the plaintiffs in the family properties would be liable and equally binding for the debt due to him. As regards the borrowings made from the 5th defendant under Exhibit B-10 to B-12, the learned trial Judge found that it was only the first defendant who borrowed such money, though stating,

ostensibly, that it was to meet family expenses and for family business. Here again, finding that none of the plaintiffs had anything to do with the borrowing nor did they concern themselves with it, the lower Court found that the debt cannot bind the plaintiffs' share in the properties. On the other hand, the 8th defendant's case that he lent money under Exhibit B-8 on a mortgage executed both by the first defendant and the first plaintiff, was accepted by the Court below as a binding debt not only on the first plaintiff but also on plaintiffs 3 to 5 who attested the same. It is common ground that the consideration for the mortgage was to meet marriage expenses of the 4th plaintiff. Taking such documentary evidence into consideration, the lower Court found that the debt in favour of the 8th defendant would be binding on the share of all the plaintiffs 1 and 3 to 5. Obviously, he omitted the 2nd plaintiff because she did not evince any interest nor did she concern herself with the borrowing.

3. We may, therefore, at once, state that the lower Court meticulously examined the facts and circumstances before it and considered the circumstances under which the borrowing was made and after finding whether the plaintiffs—all of them or one or more of them—were ever interested in the borrowing or concerned themselves with it, the lower Court upheld the contentions or disagreed with such contention of the respective creditors. Everything, therefore, was based on the evidence let in and on the fair inference that could be drawn on such evidence before it.

4. In the above context, the pleadings and the evidence let in in connection with the debts incurred by borrowing from the 6th and the 7th defendants have to be considered. No doubt, the case of the defendants 6 and 7 as the appellants before us, is that the borrowing was for the purpose of joint family business and the joint family. Neither the 6th nor the 7th defendant entered into the box to speak about the circumstance under which they lent money or supplied goods to the first defendant. It is common ground that they did not not seek for an elucidation of the bargain so that further light can be thrown upon it by calling for the account books maintained by the 1st defendant in connection with the family business and establish therefrom or *aliunde* that the plaintiffs did secure some benefit in some shape from the exercise of the profession by the first defendant and by the continuance of the joint family business by him. But, on the other hand, they were content by resting their contentions on the legal position which, according to them, flows from section 6 of the Hindu Succession Act, 1956. The learned trial Judge was of the view that the plaintiffs can take advantage of the law as stated in the proviso to section 6 and as they did not claim any share in the profits made by the first defendant in his business, it cannot be said that all the debts incurred by the first defendant, may be as manager of the joint family, can bind them, unless they actively or passively participated in the business and the consequential borrowings made by the first defendant. The learned Judge, therefore, held that though the debts due to the appellants are true and valid, they are not binding upon the plaintiffs and the properties which they inherited as heirs to Palavesam Pillai under the proviso to section 6 of the Hindu Succession Act, are not liable to be attached in execution of the decree obtained by the appellants in O.S. Nos. 29 and 30 of 1967. The question, therefore, is whether the share of the plaintiffs which they obtained as stated by them and which are not in dispute is liable to be proceeded against in execution of the decrees obtained by the appellants as above. To appreciate this contention, it is necessary to understand the import of section 6 of the Hindu Succession Act, 1956, hereinafter referred to as the Act. This section reads as under:

> "6. *Devolution of interest in coparcenary property*:—When a male Hindu dies after the commencement of this Act, having at the time of his death as interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving memers of the coparcenary and not in accordance with this Act:
>
> Provided that, if the deceased had left him surviving a female relative specified

in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara co-parcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1.—For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2.—Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

5. In the first paragraph of the section the sense and the spirit of the ancient Hindu Law is maintained as under it, if a male Hindu dies, having as interest in Mitakshara coparcenary property, his interest shall devolve by survivorship upon the surviving members of the coparcenary. The Act, therefore, does not affect the continuance of the coparcenary after the commencement of the Act. But, by reason of the proviso to section 6 it has made an inroad into the old orthodox law by making a departure to the normal theory of survivorship. The proviso contemplates that if the deceased has left behind him suriving a female relative or male relative claiming through such female relative, specified as class I heirs in the schedule, then the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under the Act and not by survivorship. The *Explanation* expands the expression "interest" of a Hindu in a Mitakshara coparcenary. By a fiction created under the Act a notional partition is contemplated. Under the *Explanation* the share which the class I heir specified in the proviso would inherit would be that share in the coparcenary property that would have been allotted to the deceased member if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. Thus in a notional partition statutorily contemplated under the proviso read with *Explanation* I to section 6, the interest of the deceased coparcener in the joint family devolves by succession in the absence of testamentary disposition by the concerned member on all the class I heirs mentioned in the proviso as above. All such heirs under the Act share such an interest of the deceased *per capita* and as tenant-in-common. Such statutory right to succeed creates, as it were, an independent proprietary interest in each of the statutory heirs in the property of the deceased member. Even though the quandom joint family may be continued for the purposes of orthodox Hindu Law and there is a manager or kartha in charge of the affairs of such joint family, yet such a manager or kartha cannot be reason of his peculiar position as such manager, contract debts or create obligations so as to bind the female members of the family specified as heirs in the proviso to the section or the male heirs mentioned therein, as a matter of course. Such female members or the male members classified therein obtain such a statutory privilege, benefit or right by reason of a fiction created under the Act. There may be cases, however, where the female members as above or the male members might have, either expressly or by necessary implication, participated in, or involved themselves in, the affairs of the joint family or in the continuance of the joint family business or activity. We assume for the purpose of the present situation that there was a joint family business and that was continued by the surviving member of the coparceneary, *viz*., the 1st defendant and he was the kartha or manager who was looking after the said business. In all such cases, the female members or the male members specified in the proviso to section 6 other than such a kartha cannot be made liable for the debts incurred by such kartha of the joint family or coparcenary without strict proof of participation or involvement of the female members or males other than the kartha

in the said business. Such female or the heirs mentioned in the proviso might as members, obligators or parties to a particular contract or bargain, voluntarily bind themselves to become liable along with the manager or kartha. This is a matter for proof. But, it does not axiomatically, follow that since there is a kartha, since there is a joint family and since there is a joint family business, the heirs who inherit the share of the deceased member of the coparcenary under the Act are coparceners and are to be automatically made liable for all the debts incurred by such kartha or manager. To adopt with respect the words of Ismail, J., in *Veerasekara Varmarayar* v. *Amirthavalli-ammal*[1].

> "The effect of *Explanation* to section 6 is to carve out the interest of a deceased coparcener from the joint family property and from the moment of the death of the coparcener concerned, his interest ceases to be coparcenary property, and therefore, outside the powers and jurisdiction of the kartha to deal with the same."

We have already referred in this case, to the peculiar circumstances which the lower Court noticed which established such participation of the plaintiffs as female members of the family in the borrowings made by the 1st defendant in connection with the joint family business continued by the 1st defendant. After noticing such nexus between the activity of the concerned female member and the borrowing, the Court held that, in certain circumstances, one or the other of the plaintiffs are liable to pay such debts though incurred by the 1st defendant as the manager of the joint family.

6. Srinivasan, J., speaking for the Bench in *Karuppa Goundar* v. *Palaniammal*[2], held that the "persons (the heirs specified in the proviso to section 6) are entitled to succeed to the interest of the deceased coparcener under the Act but they shall not be subject to the hazard of the fluctuating fortunes of the family." The recitation within brackets is ours. When the learned Judges laid the accent on the hazard of the fluctuating fortunes of the family, they obviously made it clear that the female members, of which class we have been considering throughout cannot be indiscriminately be held to be involved in the activities of the manager of the family irrespective of their voluntary zeal or interest in it by openly or by necessary implication, participating in such activities.

7. A Full Bench of the Andhra Pradesh High Court in *P. Govinda Reddy* v. *Golla Obulamama*[1], dealt with the implications and the purport of section 6 of the Act and the learned Judges observed thus:

> "If the deceased has left only coparceners, the rule of survivorship will apply. But, if he has left any female relatives specified in class I of the schedule *viz.*, daughter, widow, mother, daughter of a pre-deceased son, widow of a pre-deceased son........the devolution will be only under Act XXX of 1956 and not in accordance with the law of survivorship..........................
>
> *Explanation I* introduces out of necessity a legal fiction for ascertainment of interest of the deceased coparcener.... The legal fiction was designed for a limited purpose, *viz.*, for computation of the interest of the deceased coparcener for purposes of devolution of the same on his heirs so that there may be no difficulty in giving effect to the proviso.........................
>
> The term 'interest' no doubt, is used even in the first part of the section. But the *Explanation* is of no practical importance in relation thereto for there can be no occasion for separation or ascertainment of this interest if the case fell exclusively within the first part of the section.......
>
> One would do well to bear in mind that section 6 of the Hindu Succession Act, is concerned with the devolution of a deceased coparcener's interest alone. It has nothing to do with the disruption of the joint family status.........

1. (1974) 87 L.W. 397 at 398 : A.I.R. 1975 Mad. 51.
2. (1963) 1 M.L.J. 86 : 76 L.W. 236 : I.L.R. (1963) Mad. 443: A.I.R. 1963 Mad. 245 at 249.

1. (1971) 2 An.W.R. 43 : (1971) 2 A.P.L.J. 231 : (1971) 2 An.L.T. 97: A.I.R. 1971 A.P. 363 at 373.

> The effect of section 6 on the coparcenary, if at all, is that in case the proviso applied to the devolution of the interest of the deceased that interest or specified share will be taken in pursuance of the legal fiction, out of the coparcenary property in so far as the heirs of the deceased are concerned and will be available for allotment to them. Otherwise the coparcenary will continue as ever. ....
>
> On the other hand, if the proviso of section 6 of the Act applied on account of the existence of the heirs referred to therein, there will be of course no disruption of joint family status but the coparcenary property will not include the interest of the deceased coparcener by reason of succession under the Act and it will not then be available to the coparceners and heirs as coparcenary property and the kartha in relation thereto therefore cannot exercise his powers as a kartha."

8. We respectfully adopt the above observations. The estate which devolved on the classified heirs under the proviso to section 6 is one which is carved out of joint family and is the independent and separate property of such heirs. If this understanding of section 6 of the Act is correct, then, it follows that the property to which the classified heirs would succeed by reason of the statutory privilege under the proviso to section 6 is their property and cannot be dealt with without reference to then by the kartha of the family on the foot that he is continuing the joint family business for the benefit of the members of the joint family.

9. If, on the other hand, there is proof that the debt was incurred by the kartha of the joint family in conjunction with such classified heirs as above and with their consent, either tacitly or by necessary implication, then, by reason of such a bargain, the female and the other heirs to such sharers may become involved and that involvement or participation may make then liable for the debt. But, in order to make them liable in the eye of law, it is necessary that there should be acceptable proof and enough material so as to make them liable for such debts incurred by the kartha in the course of the management of the joint family. The liability or the obligation to shoulder such responsibility would therefore depend upon the proof of the connection or the nexus between the debt and the activity of the classified heir. If the female heir or the other heirs as mentioned in the proviso to section 6 by reason of their conduct give a resonable man the impression that they allowed the kartha to borrow and they prompted the creditor to give on their assurances and on their being joint promisors or obligors, then, they cannot escape liability.

10. In the instant case, the appellants did not even get into the box. But they pleaded that the debt was incurred by the first defendant as kartha or manager of the family for the purposes of the joint family business. Reliance is placed by Mr. Ramasubramaniam, on the evidence let in by the other creditors who figured as defendants in the action to show that the borrowing made by the first defendant in the course of the family trade should be deemed to be for the benefit of the female members as well. This contention, as at present, rests purely on surmise. But, the first defendant who is the principal architect of this borrowing and who is behind the scene, did not care to contest the proceedings or assist the Court by producing such material before it to dislodge the impression that the debt was not for the benefit of all the members of the family including the plaintiffs. No doubt the primary burden of proof was on the plaintiffs to establish that they did not have anything to do with the debt by calling for all the account books of the joint family firm from the first defendant who is none else than the son of the first plaintiff and the brother of plaintiffs 2 to 5. Excepting for the statements filed by the plaintiffs, they had not also clearly established that, at no time, they did have anything to do with the borrowing made by the first defendant from the appellants. In contrast to this state of affairs, we have already seen that the lower Court found that the debts created under Exhibits B-8, B-2 and B-3 are binding on some of the plaintiffs. This conclusion was obviously based on the evidence let in before it. Even as regards the appellants, the lower Court adopted the same test and on the material placed could not find any such involvement of the plaintiffs with the debts in-

curred by the first defendant by borrowing from the appellants. We are of the view that justice should be done by giving an opportunity to the appellants to produce or cause the production of such acceptable evidence so as to connect the debt with the plaintiffs. In what manner the appellants are to establish this, we are not making any suggestions. If the appellants establish, in a manner known to law, before the trial Court to whom the subject-matter is being remitted by us, that the plaintiffs did involve themselves in the borrowing and actively participated in the business throughout, then, it would be just that the appellants should succeed and be in a position to proceed against the properties inherited by the plaintiffs as heirs under the proviso to section 6. But, if, however they are unable to establish such a link as between the plaintiffs' activity and the borrowing then, the conclusion arrived at by the Court below is right though for a different reason.

11. In order to subserve justice, we are of the view that the matter should be remitted back to the Court below for purposes of further elucidation on the question whether the plaintiffs did, at any time actively or by necessary implication, involve themselves or participate in the borrowings made by the first defendant from the appellants and whether such involvement and participation gives the impression to a reasonable man that they had a benefit out of such borrowing. If the answer is 'yes' the plaintiffs' share which they obtained, as heirs of Palavesam Pillai, would be liable to be proceeded against. If not, that share would not be liable as such. It is not quite clear as to how the Court below came to the conclusion that the plaintiffs cannot claim any share in the profits made by the first defendant in his business. The trial Court did not examine the account books of the business nor did it call for the balance sheets or the Income-tax returns to find whether anyone other than the first defendant was paid any profits therefore or not. The observation so made by the lower Court is not based on any material considered by it. This appears to be a casual observation.

12. Taking all the circumstances into consideration the appeal is allowed and the subject-matter of the appeal is remitted for a reassessment of the issue, in the light of our observations. On result, if the trial Court finds that the plaintiffs did have every thing to do with the borrowing or that they had a benefit out of such borrowings, then, it would held that the plaintiffs' share in Palavesam Pillai's properties would also be liable for the debt in favour of the appellants. The appellants, even if they succeed in the Court below, shall not be entitled to the costs as it is their inaction that is responsible for this apparent confusion. There will be no order as to costs in this appeal. In all other respects the decree and judgment of the Court below, is confirmed.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*G. Ramanujam, J.*

S. W. Thambi Raj *Petitioner**

v.

The State Bank of India by Chief General Manager of Madras Circle, Madras-600 001 *Respondent.*

State Bank of India (Officers and Assistants) Rules, rule 51—*Branch Manager—Application for loan for purchase of car—Loan sanctioned—Car not purchased within time prescribed— Disciplinary proceedings taken against Branch Manager—Challenge—Rules whether statutory—Held not statutory—Validity of rule* 51 *upheld—Proceedings— Whether violative of natural justice—Oral enquiry not necessary—Constitution of India* (1950), *Article* 226.

The petitioner, who was working as Superintendent of a Department in the head office of the State Bank of India was transferred as Branch Manager, Vridhachalam Branch. Before going on transfer, he applied for a loan of Rs. 8,700 for the purchase of a car. The loan was sanctioned but the petitioner did not purchase the car within one month, as per the conditions of the loan. How-

* W.P. No. 6337 of 1975. 10*th March*, 1976.

ever, he informed the head office that he would be purchasing the car within a specified date, but failed to do so. Disciplinary proceedings were initiated against the petitioner and he was found guilty of unauthorised use of bank's funds and of submitting a false receipt for the purpose of scrutiny of the head office. A show cause notice was issued by the Bank proposing to cancel two increments due to the petitioner. The petitioner challenged this show cause notice contending that the State Bank of India (Officers and Assistants) Service Rules were of a statutory nature, that rule 51 did not contemplate an oral enquiry and as such, the said Rule was unreasonable and that the proceedings violated the principles of natural justice as an elaborate enquiry was not held.

Held: The Officers and Assistants Service Rules had no statutory basis nor could they be treated as by-laws made by the Bank. The rules had binding effect only by virtue of the declaration given by the employee in Form 'A' appended to the Rules and not by their own force. Therefore, the Rules in question were merely the terms and conditions of employment and service.

[*Para.* 8.]

Though rule 51 did not comtemplate any opportunity being given to the officer concerned before proposing to inflict a minor punishment, in this case, the petitioner had been given more than one opportunity to make his representations in relation to the charges before they were held proved. Therefore, it could not be said that the petitioner was not given an opportunity to put forward his representations to the charges before the penalty of stoppage of increment was proposed in the impugned show cause notice. Rule 51 cannot be considered as being unreasonable. [*Para.* 12.]

The principles of natural justice were not abstract principles and the same had to so vary, with reference to the nature of the charges, the punishment proposed therefor and the rules relating to the enquiry. The rules contemplated an elaborate enquiry in the case of major penalties and such an elaborate enquiry was not contemplated in relation to minor penalties such as stoppage of increments. The petitioner insisted that an elaborate enquiry as was contemplated in the case of major penalties should also be held in relation to the said minor penalty. If under the service rules, or the terms and conditions of service, an oral enquiry was not contemplated in cases of minor penalties, the minor penalty imposed could not, be questioned as violating the principles of natural justice.

[*Para.* 17.]

Cases referred to :—

Ramesh v. *State Bank of India*, 1975 Lab. I.C. 175: (1974) Mah.L.J. 845; *Ramiah* v. *State Bank of India*, (1963) 2 L.L.J. 304: A.I.R. 1964 Mad. 335; *Dattatraya* v. *State Bank of India*, (1969) M.P.L.J. 166; A.I.R. 1969 M.P. 114 ; *Indian Airlines Corporation* v. *Sukhdeo Rai*, (1971) 1 L.L.J. 496 : A.I.R. 1971 S.C. 1828; *S. R. Tiwari* v. *District Board, Agra*, (1964) 3 S.C.R. 55 : (1964) 2 S.C.J. 300 : A.I.R. 1964 S.C. 1680; *Ram Babu Bathaur* v. *Life Insurance Corporation*, A.I.R. 1961 All. 502; *Life Insurance Corporation* v. *N. Banerjee*, (1971) 1 L.L.J. 1; *Sukhdev Singh* v. *Bhagatram*, (1975) Lab.I.C. 881 : 45 Comp. Cas. 285: A.I.R. 1975 S.C. 1331; *Malloch* v. *Abardeen*, (1971) 1 W.L.R. 1578; *Ramiah* v. *State Bank of India*, (1968) 2 L.L.J. 424.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records and quash the notice contained in Letter No. 21871 of 24th October, 1973 and directing the respondent to pay increments that fell due to the petitioner on 24th November, 1973 and 24th November, 1974.

U. N. R. Rao, for Petitioner.

S. Ramasubramaniam, for *M/s. King and Patridge*, for Respondent.

The Court made the following

ORDER.—The petitioner herein was working as Superintendent, Savings Bank Department, in the head office of the State Bank of India till July, 1970. In July, 1970 he was posted as a Branch Manager, Vridhachalam Branch. Before

going on transfer, he had applied for a loan of Rs. 8,700 for the purchase of a car. The loan was sanctioned on 18th July, 1970 and credited in his current account. Though as per the conditions of the grant of loan, the petitioner has to purchase the car within one month from the date of the sanction of the loan, the petitioner admittedly did not purchase the car, within that time. He, however, informed the head office by his letter dated 1st March, 1971 that he had paid a sum of Rs. 8,000 to one Ramaswami Odayar for the purchase of an Ambassador Car MSM. 5589 at a price of Rs. 16,500. He later informed the head office by his letter dated 6th March, 1971 that the transaction will be completed before 15th of April, 1971 and that if it is not possible to do so, he will arrange to repay the loan without fail on that date. As the petitioner did not either complete the transaction of purchase of a car by 15th of April, 1971 or repay the loan as stated by him, disciplinary proceedings were initiated against him by issuing a memo. dated 15th September, 1971 alleging 3 irregularities and calling upon him to submit his written explanation. The petitioner submitted his explanation on 19th June, 1972. Not satisfied with the said explanation, the respondent by its memo. dated 5th February, 1973 informed the petitioner that it has been decided to order an independent investigation into the matter in terms of rule 50 (1) of the State Bank of India (Officers and Assistants) Rules, hereinafter referred as the Rules, that one S. V. Kumar, the Staff Officer, Madras, has been appointed as investigating officer and that the petitioner will be given full opportunity at the investigation to present his case. After investigation, the said S. V. Kumar submitted his report to the Bank. After consideration of that report along with the written explanation given by the petitioner, the respondent sent a show cause notice dated 24th October, 1973, holding the petitioner guilty of unauthorised use of bank's funds obtained at considerate rate of interest and of submitting a false receipt for the purpose of the scrutiny of the head office, and proposing to cancel two increments due to him on 24th November, 1973 and 24th November, 1974 as penalty for the said acts of misconduct in terms of rule 51 of the said rules. The petitioner has approached this Court for the issue of a writ of *certiorari* to quash the said show cause notice dated 24th October, 1973.

2. The petitioner's case is that the first irregularity for which the proposed punishment is sought to be imposed is only a breach of the loan agreement and therefore it cannot form the subject-matter of a disciplinary enquiry. As regards the second irregularity, the petitioner's case is that the receipt issued by Ramaswami Odayar and produced by him before the Respondent is a genuine one, and there was no false representation by the petitioner in that regard and that, therefore the second charge is based on no material. The petitioner also contends that the procedure adopted at the stage of enquiry contravenes the safeguards given to him under the Service Rules referred to above, that he was not given an opportunity of oral enquiry and as such the principles of natural justice have been violated before holding the petitioner guilty of the two irregularities set out in the show cause notice. In this connection, the learned counsel for the petitioner submits that the respondent is a public authority and the employment under it is public appointment that, before a person in public employment is punished, the public authorities are bound to follow the principles of natural justice whether such principles are contained in the rules or not, and that in this case the petitioner not having been given due opportunity to put forward his defence, the Court has to quash the show cause notice and direct the respondent to give an opportunity for the petitioner to defend himself in the disciplinary proceedings.

3. The respondent, however, has stated in its counter-affidavit that though as per the conditions of the loan agreement the petitioner is bound to purchase a car within one month, he not only did not purchase the car in time but also gave misleading particulars and produced a receipt from a person who had

no intention of selling his car. As regards the nature of the disciplinary enquiry held in the case of the petitioner, it has been stated that the Chief Vigilance Officer at the Madras Head Office investigated the matter locally at Vridhachalam and at the stage of enquiry the said Ramaswami Odayar has given a statement that he never sold his car to the petitioner. After such investigation, the Chief Vigilance Officer reported that the petitioner did not purchase a car from Ramaswami Odayar and that the stamped receipt given by Ramaswami Odayar and produced by the petitioner was not a genuine one. Thereafter the petitioner was called upon to explain the irregularities by a notice dated 15th September, 1971. The petitioner in his explanation dated 20th September, 1971 while admitting the delay in the purchase of the car by availing the loan granted by the bank has stated that the sale did not go through due to misunderstanding between Ramaswami Odayar and his financier. Along with the reply, he submitted an affidavit from Ramaswami Odayar to show that Odayar initially intended to sell the car but could not complete the transaction because of certain circumstances beyond his control. After considering the explanation given by the petitioner, the respondent decided to have the matter investigated through one of its Officers in terms of rule 50 (1) before taking further action. One Sri S. V. Kumar, investigated the matter and sent a report. After consideration of the report, the respondent took the view that the petitioner is guilty of: (1) not utilising the loan within the stipulated period in violation of the terms of the loan; and (2) fabrication of receipt for Rs. 8,500 dated 22nd September, 1970 and issued a show cause notice dated 24th October, 1973 proposing to cancel two increments of the petitioner as a penalty in terms of rule 51 read with rule 49 (*b*). The petitioner submitted his explanation to the show cause notice only on 17th June, 1974. But as the State Bank of India Supervising Staff Association had made certain representations in that regard, the passing of the final orders was delayed and in the meanwhile the petitioner has approached this Court challenging the show cause notice. According to the respondent, there has been no violation of the principles of natural justice in the conduct of the enquiry against the petitioner and that in fact, there has been due compliance with the rules in question.

4. The learned counsel for the petitioner firstly submits that the non-utilisation of the loan amount for the purchase of the car within the time stipulated cannot fall within the disciplinary jurisdiction, that the breach of a loan agreement, if at all, will expose the petitioner to a claim for damages, and that such a breach can in no case form the basis for disciplinary proceedings. Though there is some force in this contention of the learned counsel, still the second charge levelled against the petitioner, if proved, will be sufficient to form the basis for a disciplinary action. Therefore, the initiation of disciplinary proceedings against the petitioner cannot be said to be without jurisdiction.

5. The learned counsel for the petitioner then contends that even assuming that the disciplinary proceedings have been rightly initiated against the petitioner, the disciplinary proceedings here had been conducted in violation of not only principles of natural justice in that the petitioner did not have an opportunity of rebutting the statement given by Ramaswami Odayar that he never intended to sell his car, but also the provisions of the relevant Rules framed for the purpose.

6. According to the petitioner, the State Bank of India (Officers and Assistants) Service Rules have been framed by the Central Board by virtue of its power under section 50 of the State Bank of India Act, 1955 and therefore, they are statutory. Rule 50 of the said rules contemplating somewhat elaborate and fuller enquiry in disciplinary matters had not been followed in his case, and therefore, the petitioner did not have adequate opportunity as contemplated by rule 50. The respondent, not the other hand, contends that the said Rules are non-statutory, that in any event the said rules having been duly complied with in the conduct of disciplinary pro-

ceedings against the petitioner, the show cause notice is not vitiated for non-observance of either the said rules or the principles of natural justice, that this Court, exercising its extraordinary jurisdiction under Article 226 of the Constitution cannot sit as if it were an appellate Court and set aside the findings of the disciplinary authority that the petitioner is guilty of the two irregularities, except in a case where there is absolutely no material from which the said finding could be arrived at, and that therefore, if the disciplinary enquiry has been conducted after giving a reasonable opportunity as per the Rules, the petitioner cannot succeed in challenging the impugned show cause notice. That the State Bank of India (Officers and Assistants) Service Rules are not statutory is clear from the following facts. Section 43 (1) of the State Bank of India Act, 1955, enables the State Bank to appoint such number of officers, advisers and employees as it considers necessary or desirable for the efficient performance of its functions, and determine the terms and conditions of their appointment and service; section 49 (1) enables the Central Government in consultation with the Reserve Bank, to make rules for carrying out the purpose of this Act; section 50 (1) enables the Central Board of Directors of the State Bank, after consultation with the Reserve Bank and with the previous sanction of the Central Government to make regulations not inconsistent with the Act and the Rules framed thereunder. The State Bank of India (Officers and Assistants) Service Rules have not been framed by the Board after consultation with the Central Government or the Reserve Bank of India as required under section 50. Section 43 (1) merely enables the Board to determine the terms and conditions of appointment and service of its employees. The scope of these rules came up for consideration before the Bombay High Court and they have been held to be non-statutory by a Division Bench in *Ramesh* v. *State Bank of India*[1].

7. Similar rules framed by the Central Board dealing with the service conditions of Sub-Accountants and Head Cashiers styled "State Bank of India (Sub-Accountants and Head Cashiers) Service Rules" have been held to be non-statutory by Veeraswami, J. (as he then was) in *Ramiah* v. *State Bank of India*[1], In *Dattatraya* v. *State Bank of India*[2], a somewhat different note was struck and the same rules were held to be bye-laws made by the State Bank though they may not be statutory rules. In the Madras case the Court expressed the view that section 43 of the State Bank of India Act did not empower the Bank to make service rules and observed:

> "The section only empowers the State Bank to appoint its officers, advisers and employees, their number depending upon the necessity or desirability for the efficient performance of the bank's functions. The further power of the State Bank under the section which is related and incidental to the power to make appointments, is the power to determine the terms and conditions of appointment and service. There is nothing to prevent the State Bank of India from fixing such terms and conditions and changing the same from time to time at its discretion. The power under section 43 enables the bank no more than to fix the terms and conditions of service by entering into service agreements or otherwise in relation to the officers, advisers and employees appointed by it. There can, therefore, be nothing statutory about or in the determination of the terms and conditions of the service. Such determination of the terms and conditions does not have the effect of making the rules have the force of law. It is under this section the State Bank is enabled to enter into service agreements with its employees."

In the Madhya Pradesh case he Court expressed:

> "The decision of the Madras High Court can, therefore, be regarded as supporting the view we have taken

1. (1974) Mah.L.J. 845 : 76 Bom.L.R. 552 : (1975) Lab.I.C. 175.

1. (1963) 2 L.L.J. 304 : A.I.R. 1964 Mad. 335.
2. (1969) M.P.L.J. 166 : A.I.R. 1969 M.P. 114.

that under section 43 of the Act bye-laws can be made for regulating the terms and conditions of service of the Bank's employees, officers and advisers. If the 'Rules' are bye-laws, then they can be challenged on the ground that they are unreasonable."

The scope of a bye-law made by a Corporate Body has been dealt with in Halsbury's Laws of England, 3rd Edition, Volume 9 at page 40-41:

"77. *Bye-laws*: All regulations made by a corporation and intended to bind not only itself and its officers and servants, but members of the public, who come within the sphere of their operation, may properly be called "bye-laws" whether they are valid or invalid in point of law; but the term may also be applied to regulations binding only on the corporation, its officers and servants.

78. *Extent of power*: Every corporation has the power to make bye-laws relative to the purpose for which it is constituted. Such bye-laws however, do not bind persons other than members unless they are made under statutory authority, or unless it is shown that they have been brought to the knowledge of the person sought to be bound by them, and that he has agreed to be so bound.....

79. *Exercise of power*: The power to make bye-laws either by the body at large or by a select part is incident to every corporation...."

8. In my view, the Officers and Assistants Service Rules have no statutory basis nor can they be treated as bye-laws made by the bank. The rules in question have binding effect only by virtue of the declaration given by the employees in Form 'A' appended to the Rules and not by their own force. Therefore the rules in question are merely the terms and conditions of employment and service and they bind the employees as a result of the declaration given by them. In *Ramesh* v. *State Bank of India*[1], earlier referred to, a Division Bench of the Bombay High Court dealing with the scope of the same Rules held that the Officers and Assistants became members of the staff of the State Bank not by virtue of the rules framed by the Central Board but by reason of the contract of employment entered into by them with the bank, that by giving a declaration in the prescribed form 'A' in Appendix I to the Rules, the Service Rules become the terms and conditions of the contract of employment and, therefore, the Service Rules partake the nature of being contractual terms of employment. The learned Judges have not accepted the view of the Madhya Pradesh High Court in *Dattatraya* v. *State Bank of India*[1], that the Service Rules can be regarded as bye-laws framed by the Corporation, on the ground that even if they were to be treated as bye-laws framed by the Bank in exercise of its inherent power they cannot be taken to have the force of law and that the rules have no binding force *proprio vigore* but have such binding force by reason of consent of both the employee and the employer. The learned Judges ultimately took the view that as it is not obligatory for the Bank to frame rules, bye-laws or regulations for fixing the conditions and terms of service. Service Rules will have to be regarded as a set of Rules embodying the terms and conditions of service on contractual basis. With respect, I am inclined to agree with the said decision of the Bombay High Court and hold that even if the Service Rules are taken to be bye-laws framed by the State Bank, they cannot have the force of law, for the applicability of the rules is made dependent on the employee concerned signing the declaration to be bound by the rules and that but for such a declaration it will have no application to that employee.

9. The question then is whether the said rules had been duly followed in this case by the respondent. Two contentions that have been advanced by the learned counsel for the petitioner for questioning the validity of the show cause notice proposing to impose the penalty of stoppage of increment are: (1) Rule

1. (1974) Mah.L.J. 845 : 1975 Lab.I.C. 175.

1. (1969) M.P.L.J. 166 : A.I.R. 1969 M.P. 114.

51 is unreasonable in that it does not provide for an effective opportunity for the officer concerned to defend himself and it takes away the right to have such an opportunity provided under rule 50. (2) In any event the show cause notice is in violation of the principles of natural justice.

10. As regards the first contention, the petitioner's learned counsel submits that in respect of minor penalties set out in clauses (*a*) and (*b*) of rule 49, rule 51 does not contemplate an oral enquiry and as such, the said rule should be taken to be unreasonable. I am not able to accept this contention. It is true, rules 50 and 51 make a distinction between disciplinary enquiries which result in major punishments, such as termination of service, dismissal or reduction in rank, and those resulting in minor penalties such as censure, cancellation, withholding, reducing or delaying of the increments. Rule 50 provides for a fuller opportunity in cases falling under the former category, while in respect of the latter category only an opportunity of filing a written statement to charges levelled against the delinquent officer is contemplated under rule 51. It is not possible to say that such a distinction is unreasonable. In respect of disciplinary enquiries resulting in minor penalties, it cannot be expected that the disciplinary authority should embark on a detailed and full enquiry involving considerable time and energy as it is expected of him in relation to enquiries resulting in major penalties. Such a distinction has necessarily to be made to avoid unnecessary waste of time in relation to minor matters which merely involve the imposition of very minor punishments. Such a distinction has been made even under the statutory rules framed under Article 309.

11. Rule 50 so far as it is relevant for the purpose of this case is as follows :

> " 50 (1). Where the Managing Director in the case of an employee serving in or under the Central Office or the Secretary and Treasurer in the Case of an employee serving in a Circle is satisfied that there is a *prima facie* case for proceeding against an employee, he may investigate the case himself or appoint the Chief Inspector or the Deputy Secretary and Treasurer or any other officer to investigate the case and submit an independent report thereon in writing.
>
> (2) A brief statement of the charges together with the grounds on which they are based shall then be communicated in writing to the employee. The employee shall be required to submit a written statement in defence and also given an opportunity to be heard in person if desired by him. He shall also be given facilities for access to the records of the Bank for the purpose of preparing his written statement but the Managing Director or the Secretary and Treasurer may, for reasons to be recorded in writing, refuse him such access if in his opinion such records are not strictly relevant or it is not desirable in the interests of the Bank to allow such access.
>
> (3) The report of the Officer who investigated the case, together with the employee's statement and a further report in writing by the Managing Director or the Secretary and Treasurer, indicating the specific charge or charges against the employee shall be laid for consideration, in the case of an employee serving in or under the Central Office before the Executive Committee and in the case of an employee serving in a Circle, before the Local Board.
>
> (4) The Executive Committee or the Local Board, as the case may be, shall make such order as they may consider proper in the circumstances, but if they consider it to be a fit case for imposing a penalty mentioned in clause (*c*) or clause (*f*) of rule 49, the employee shall be given a further opportunity to state in writing by a specified date why such penalty should not be imposed against him. For this purpose the charge or charges against him together with a copy of the report of the Officer who investigated the case and specific penalty proposed to be imposed shall be communicated to him by the

Managing Director or the Secretary and Treasurer, as the case may be.

(5) The Managing Director or the Secretary and Treasurer, as the case may be, will then lay the employee's statement together with his report thereon before the Executive Committee or the Local Board, as the case may be. In the case of an employee serving in a Circle, the recommendation of the Local Board shall be laid with all the relative papers before the Executive Committee.

(6) The Executive Committee shall then take the matter into their consideration and shall make such order as they consider proper in the circumstances."

Rule 51 however says that when it is proposed to cancel withhold, reduce or delay the increment due to an employee the procedure prescribed in rule 50 shall not be followed and it is enough if the employee concerned is given an opportunity to make a written statement in his defence as regards the proposed punishment.

According to the learned counsel rule 51 is bad as it dispenses with all the formalities contemplated by rule 50 and prescribes instead only for an opportunity to file a written statement as regards the proposed penalty. It is true as the learned counsel points out that rule 51 dispenses with all the formalities in cases of minor punishments, except the opportunity of filing a written statement as regards the proposed penalty. A conjoint reading of rules 50 and 51 indicates that in cases involving minor penalties a show cause notice against the proposed penalty is sufficient. The minimum requirement of communicating the charges to the concerned officer and obtaining an explanation from him on those charges before deciding to impose a punishment does not appear to be contemplated in rule 51.

12. Though rule 51 does not contemplate any opportunity being given to the officer concerned before proposing to inflict a minor punishment, in this case, the petitioner has been given more than one opportunity to make his representations in relation to the charges before they were held proved. Therefore, it cannot be said that the petitioner was not given an opportunity to put forward his representations to the charges before the penalty of stoppage of increment was proposed in the impugned show cause notice. I do not, therefore, consider it necessary to invalidate rule 51 as being unreasonable.

13. As regards the second contention the learned counsel for the petitioner says that the petitioner was not given an opportunity of personal or oral hearing and therefore, the principles of natural justice have been violated. It is said that in relation to the second charge the statement given by Ramaswami Odayar that he did not intend to sell the car when he gave the receipt, can be rebutted only at an oral enquiry, that the conclusion arrived at by the disciplinary authority without conducting any such enquiry violates the principles of natural justice and that the service under the State Bank being in the nature of public employment before a penalty is imposed on an employee all the principles of natural justice have to be followed, whether they have been incorporated in the rules or not. The learned counsel refers to the decision of the Supreme Court in *Sukhdev Singh* v. *Bhagatram*[1], in support of his submission that the State Bank of India is an authority coming within the definition of 'State' under Article 12 of the Constitution and, therefore, it is bound to follow the principles of natural justice while dealing with its employees.

14. The learned counsel for the respondent does not dispute that the State Bank of India is an authority under the control of the Government of India and hence a State as defined in Article 12, in view of the decision in *Ramiah* v. *State Bank of India*[2], wherein it has been held that the State Bank of India is a public authority coming within the scope of Article 226 of the Constitution, but he demurs to the petitioner's contention that his employment under the respondent is a public employment and, therefore it is

1. (1975) Lab.I.C. 881 : 45 Comp. Cas. 285 : A.I.R. 1975 S.C. 1331.
2. (1968) 2 L.L.J. 424.

bound by the principles of natural justice while dealing with disciplinary matters, even if the rules relating to their conditions of service do not provide for them. According to the learned counsel there are three categories of employees (1) governed by the rules framed under Article 309, (2) industrial employees to whom the industrial laws had been applied, and (3) employees who are purely governed by the terms and conditions of their employment, and the employees of the State Bank fall under the last category and are governed only by the terms and conditions of service which are set out in the rules in question. It is said that as the law of "master and servant" continues to apply to the petitioner he cannot claim the benefit of the general principles of natural justice in the matter of disciplinary enquiry and that if the conditions of service which have been put in the form of the above rules which the petitioner has agreed to be bound by virtue of the declaration given by him in Form A contained in Appendix I to those rules have been followed, there is no question of the disciplinary proceedings being violative of the principles of natural justice.

15. The learned counsel for the respondent refers to the decision of the Supreme Court in *Indian Airlines Corporation* v. *Sukhdeo Rai*[1], in support of the above submission. In that case an employee of the Indian Airlines Corporation who had been dismissed from service challenged the order of dismissal on the ground that it was in breach of the procedure laid down in the regulations framed by the corporation. The Supreme Court, after examining a number of decisions, particularly the decision in *S. R. Tiwari* v. *District Board, Agra*[2], laid down that there were three well recognised exceptions to the general rule under the law of master and servant where a declaration that an order of dismissal is a nullity cannot be given, namely, (1) cases of public servants falling under Article 309 of the Constitution, (2) cases falling under the industrial law, and (3) cases where acts of statutory bodies are challenged for breach of a mandatory and statutory obligation. In that case the Supreme Court approved the view of the Allahabad High Court in *Ram Babu Rathaur* v. *Life Insurance Corporation*[1], and of the Calcutta High Court in *Life Insurance Corporation* v. *N. Banerjee*[2], that though a Corporation was a statutory body the relationship between it and its employees was governed by a contract, and the law of master and servant, and not subject to any statutory obligation.

16. The learned counsel for the petitioner would, however, refer to the following passage in the decision of the Supreme Court in *Sukhdev Singh* v. *Bhagatram*[3]:

> "This Court has repeatedly observed that whenever a man's rights are affected by decision taken under statutory powers, the Court would presume the existence of a duty to observe the rules of natural justice and compliance with rules and regulations imposed by statute"

in support of his stand that the petitioner being an employee under a public Corporation is entitled to all the protection which pertains to public employment, one such protection being the due compliance with the principles of natural justice. The learned counsel refers to the following passage of Lord Wilberforce in *Malloch* v. *Abardeen*[4], dealing with the anomaly created by judicial decisions in the area of contractual and statutory employments :—

> "A comparative list of situations in which persons have been held entitled or not entitled to a hearing or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre. A specialist surgeon is denied protection which is given to a hospital doctor, a University Professor as a servant has been denied the right to be heard, a dock labourer and an undergraduate have been granted it; examples can be multiplied. One may accept that if there are relationships in which all

1. (1971) 1 L.L.J. 496 : A.I.R. 1971 S.C. 1828.
2. (1964) 2 S.C.J. 300 : (1964) 3 S.C.R. 55 : A.I.R. 1964 S.C. 1680.

1. A.I.R. 1961 All. 502.
2. (1971) 1 L.L.J. 1.
3. 45 Comp. Cases 285 : A.I.R. 1975 S.C. 1331 at 1341.
4. (1971) 1 W.L.R. 1578.

requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have been called pure master and servant cases, 'I take it to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection.' If any of these elements exist, then in my opinion whatever the terminology used, and even though in some *inter partes* aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void."

It is true, the above passage indicates that the requirement of the observance of the rules of natural justice can be excluded only in cases of pure master and servant and not in cases where an element of public employment or service is involved. But, the judgment of the Supreme Court in *Sukhdev Singh* v. *Bhagatram*[1] however, proceeds on the basis that though the employees of the statutory corporations have a statutory status, they are not servants of the Union or the States but are entitled to a declaration of being in employment when their dismissal or removal is in contravention of statutory provisions. Here there are no statutory provisions which have been violated.

17. As already stated, the petitioner has been given an opportunity for giving his explanation in writing to the authorities and also an opportunity to put forward his objections to the proposed punishment though there was no oral enquiry preceding the impugned show cause notice proposing the stoppage of increment. I do not think that an oral enquiry is a necessary requirement in all disciplinary proceedings irrespective of the nature of the charges and the proposed punishment. The principles of natural justice are not abstract principles and the same have to vary with reference to the nature of the charges, the punishment proposed therefor and the rules relating to the enquiry. In this case the rules contemplate an elaborate enquiry in the case of major penalties and such an elaborate enquiry is not contemplated in relation to minor penalties such as stoppage of increments. The petitioner insists that an elaborate enquiry as is contemplated in the case of major penalties should also be held in relation to the said minor penalty. If under the Service Rules or the terms and conditions of service an oral enquiry is not contemplated in cases of minor penalties, the minor penalty imposed cannot be questioned as violating the principles of natural justice.

18. In my view, the petitioner has not, therefore, made out a case for quashing the impugned show cause notice proposing stoppage of increment. The writ petition therefore fails and it is dismissed. There will be no order as to costs.

S.J. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

Mangilal Gadiya .. *Petitioner**

v.

Mahgilala Kesarimat Sewak and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 20, rule 15 and Forms 21 and 49—Suit for dissolution of partnership and accounts—Suit decreed—Decree drafted not in accordance with Form No. 21, Civil Procedure Code—Petition for amendment of the decree—Amendment allowed.

Civil Procedure Code (V of 1908), sections 151 and 152—Scope.

Order 20, rule 15, Civil Procedure Code read with Form 21 of Appendix D to the Code makes it clear that in a suit for dissolution of partnership, the Court which drafts the decree must declare the shares also. It is not necessary to declare

1. (1975) Lab.I.C. 881 : 45 Comp. Cas. 285 : A.I.R. 1975 S.C. 1331.

* C.R.P. No. 529 of 1975. 15th March, 1976.

the shares in the judgment rendered by the Court. When it is proved from the pleadings and the evidence that the parties have equal shares the decree has to be drafted by declaring the shares of the parties also. [*Para.* 5.]

In the instant case, the Court has failed to draft the decree in accordance with Order 20, rule 15 and Form 21 of the Civil Procedure Code. The mistake committed by the lower Court has to be rectified only under sections 151 and 152, Civil Procedure Code. [*Para.* 6.]

Cases referred to:—

Abdul Razack Sahib v. *Abdul Hamid Sait*, (1950) 2 M.L.J. 282 : 63 L.W 759 : I.L.R. (1951) Mad. 228 : A.I.R. 1951 Mad. 406; *Bhikhi Lal* v. *Tribeni*, A.I.R. 1965 S.C. 1935; *Nagaratnamma* v. *Seetharamamma*, A.I.R. 1952 Mad. 237.

Petition under section 115, Civil Procedure Code praying the High Court to revise the Order of the Court of the XI Assistant Judge, City Civil Court, Madras, dated 6th September, 1974 and made in I.A. No. 5378 of 1974 in O.S. No. 3782 of 1967.

Himmatmal Mardia, for Petitioner.

A. R. Raja Mailamani, for Respondents.

The Court made the following

ORDER.—The plaintiff in O.S. No. 3782 of 1967 is the revision petitioner herein. He obtained a judgment against the defendants in the suit to the following effect: "Defendants set *ex parte*. P.W. 1 examined. Exhibits A-1 and A-2 marked. Claim proved. Preliminary decree is passed with costs as prayed for in (*a*) and (*b*) of the plaint." In the decree drafted for the preliminary decree, the Court below has not stated the shares of the respective parties as provided in Form No. 21 of the Civil Procedure Code. Hence, the petitioner herein filed I.A. No. 5736 of 1974 to direct the office to amend the preliminary decree, dated 20th October, 1970 in O.S. No. 3782 of 1967 to be in accordance with Form No. 21 of Civil Procedure Code. The Respondents herein opposed this amendment stating that the decree is in accordance with the prayer made in the plaint and the plaintiff is trying to fill up the lacuna in the suit in the guise of a prayer for amendment of the preliminary decree and that the Office is correct in drafting the preliminary decree as per the judgment of the Court. The respondent further contended that if the petitioner herein is aggrieved by the drafting of the preliminary decree he can get it rectified either by way of filing an appeal or a review petition. The Court below dismissed the application observing that though the plaintiff has stated in the body of the plaint that he is entitled to a half share in the profit and that he has contributed the entire principal amount, yet he omitted to pray for a declaration respecting his share and that since the plaintiff is not willing to amend his prayer the plaintiff has to be content with the preliminary decree as it is.

2. Aggrieved by the order of the Court below the plaintiff who was the petitioner in I.A. No. 5378 of 1974 has preferred the above revision petition.

3. Mr. Himmatlal Mardia, learned counsel appearing for the petitioner brought to my notice Order 20, read the plaint, written statement and also the affidavit filed for the amendment of the decree. It is clear from the plaint that the parties *viz.*, the plaintiff and the second defendant are having equal shares in the business. The prayer in the plaint is for dissolution of partnership taking of accounts and appointment of commissioner for the inventory of the account books, articles pledged and other assets of the partnership firm. Learned counsel also stated that since the defendants remained *ex parte* a judgment and decree was passed as prayed for.

4. It is clear from Order 20, rule 15 that "where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit." In Form No. 21 which is in Appendix D for the purpose of drafting the decree it is stated that the decree must declare the proportionate

shares of the parties in the partnership. Mr. Himmatlal Mardia also pointed out rule 114 of the Civil Rules of Practice and also Form No. 38 as to the drafting of the plaints in a suit for dissolution of partnership and accounts. He also read Form No. 49 to point out how the pleading should be in such a suit.

5. On the other hand, Mr. Raja Masilamani pointed out that the Court's jurisdiction cannot be invoked under sections 151 and 152, Civil Procedure Code for the purpose of amending the decree. There is absolutely no error, clerical or otherwise to invoke the jurisdiction of the Court under section 152. Further when the remedy is available for the petitioner to file either review petition or appeal, the Court's jurisdiction cannot be invoked under section 151, Civil Procedure Code. For this proposition he cited the decisions in *Abdul Razack Sahib* v. *Abdul Hamid Sait*[1], *Bhikhi Lal* v. *Tribeni*[2] and *Nagaratnamma* v. *Seetnaramamma*[3]. I have been taken through these decisions and also the pleadings in the present case including the evidence given by P.W. 1. There is absolutely no difficulty from the pleadings and the evidence given by P.W. 1 that the shares of the plaintiff and the second defendant are equal. It is also clear from the Civil Procedure Code and also from Form No. 21 of Appendix D of the Code that the Court which drafts a decree must declare the shares also. It is not necessary to declare the shares in the judgment rendered by the Court. But when it is proved from the pleadings and also from the evidence that parties have equal shares the decree has to be drafted by declaring the shares of the parties also. This is a clear case where the Court has failed to draft the decree in accordance with Order 20, rule 15 and Form 21 as stated above. The decisions cited by Mr. Raja Masilamani, learned counsel for the respondents dealt with cases wherein the statutory rights of the parties had not been properly considered by the Court. In such circumstances it has been held that the decree cannot be amended under sections 151 and 152, Civil Procedure Code, but the remedy lies only by way of appeal and review petition. As far as the present case is concerned, it is the duty of the Court to draft the decree in accordance with Order 20, rule 15, Civil Procedure Code and Form No. 21. The mistake committed by the Court has to be rectified only under section 151 and 152, Civil Procedure Code. No authority has been cited *contra* to this proposition stated by me.

6. Thus, it is clear that the trial Court has failed to exercise its jurisdiction vested in it by law. In these circumstances, the revision petition is allowed. There will be no order as to costs.

R.S. *Revision petition allowed.*

1. (1950) 2 M.L.J. 282 : 63 L.W. 759 : I.L.R. (1951) Mad. 228 : A.I.R. 1951 Mad. 406.
2. A.I.R. 1965 S.C. 1935.
3. A.I.R. 1952 Mad. 237.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

Santhakumari .. *Petitioner**

v.

Gurumurthy and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 43, *rule* 22—*Applicability—Remand order by Land Tribunal in appeal from order of Authorised Officer under Madras Act LVIII of* 1961—*If competent and when.*

No doubt a remand should not be for a flimsy ground or without coming to the conclusion that the decree of the Court below has to be set aside or for allowing the party to fill up the lacuna if any, in evidence. If the appellate Court in the interests of justice, after setting aside the decree of the Court below, wants that a remand has to be made, it can do so. Normally when the appellate Court can invoke the provisions under Order 41, rules 24 to 27, Civil Procedure Code to dispose of the matter by itself, it is not expedient on the part of the Court to remand the matter in such circumstances. But invoking Order 41, rules 24 to 27, Civil Procedure Code is a subjective test of the Court dealing with the matter as

* C.R.P. No. 366 of 1975. 19*th March,* 1976.

such the main question that has to be considered in a case filed against an order of remand is as to whether the interests of justice require such a remand. [*Para.* 9.]

Held, that in the instant case there was no error of jurisdiction to interfere with the order of remand passed by the Land Tribunal arising out of proceedings under Act LVIII of 1961 before the Authorised Officer (Land Reforms). [*Para.* 12.]

Cases referred to :—

Annamalai v. *Narayanaswami Pillai*, (1971) 2 M.L.J. 330 : 84 L.W. 785 : A.I.R. 1972 Mad. 316 ; *Chinnan Ambalam* v. *Ramiah Mariam*, (1968) 81 L.W. 296 ; *Kichammal* v. *Kristama Naidu*, (1968) 81 L.W. 291 ; *Athayee* v. *Shanmugha Goundar*, (1965) 2 M.L.J. 259 ; *H. Venkatachala Iyengar* v. *B. N. Thimmajamma and others*, 1959 S.C.J. 507 : (1959) 1 S.C.R. (Supp.) 426 : A.I.R. 1959 S.C. 443 ; *Thirumalaiswamy Mudaliar* v. *Periasami Mudaliar*, (1951) 2 M.L.J. 532 : A.I.R. 1952 Mad. 66 ; *Butchamma* v. *Ramasitamma*, (1953) 2 M.L.J. 392 ; A.I.R. 1954 Mad. 191 ; *Ramakrishana* v. *Rangayya*, (1954) M.W.N. 216 : A.I.R. 1954 Mad. 783.

Petition under section 83 of Madras Act LVIII of 1961 praying the High Court to revise the Order of the Land Tribunal, (Subordinate Judge), Mayuram, dated 27th September, 1974 and made in L.T.C.M.A. No. 15 of 1973 (M.R.I-117 (R) NNL (A3), dated 31st December, 1972 on the file of the Authorised Officer (Land Reforms), Maynram.

V. Sridevan and *S. Santhanam* for *V. Sridevan*, for Petitioner.

R. G. Rajan, for Respondents.

The Court made the following

ORDER.—The 2nd Respondent, Santhakumari in M.R.I. 117 (R) NNL (A3) before the Authorised Officer (Land Reforms), Mayuram is the revision petitioner herein. Proceedings were taken against the revision petitioner and Ammani Ammal in respect of the lands belonging to the said petitioner and Ammani Ammal. A draft statement was published under section 10 (1) of Act LVIII of 1961. The first respondent herein filed objections under section 10 (5) of the said Act stating that the lands stated in the objection petition have to be excluded from the holdings of Radhakrishna Naidu as he happened to be a life estate holder. According to the objector, the lands mentioned in the objection petition are vested in him and hence the same has to be deleted from the holdings and further proceedings taken in the light of the objections. The petitioner and the second respondent herein contended that the objector has no right, title or interest in the property mentioned in his objection petition and nothing has vested in him.

2. To understand the case, it is necessary to refer to certain facts of this case. One Ramachandra Naidu, had two sons by name R. G. Rajan and Radhakrishnan. Gurumurthy, the objector is the son of R. G. Rajan. Radhakrishna Naidu married one Seethalakshmi. She had no issues. It is stated by the petitioner herein that Radhakrishna Naidu married Ammani Ammal and through her he had a son by name Ramadurai and two daughters by name Santhakumari and Suryakumari. Santhakumari is the petitioner herein. Ramachandra Naidu and his two sons R. G. Rajan and Radhakrishnan originally partitioned the joint family property and each one got one-third share. It is stated that Ramachandra Naidu executed a will in 1928 itself giving life interest to Radhakrishna Naidu and after his life-time his male issue has to get the property. The objector relied upon a codicil, dated 13th March, 1940 executed by Ramachandra Naidu and stated that as per this codicil the property of Ramachandra Naidu has to be enjoyed only by the male issue through Seethalakshmi and if there is no male issue through Seethalakshmi, the objector has to get the property.

3. The authorised officer, after going through the codicils, dated 17th June, 1928 and 13th March, 1940 and after taking into consideration as to whether Gurumurthi has got a vested remainder over the property as claimed by him in his objection petition, held that since all these matters have been decided in MRI. 37(R), dated 25th November, 1970 the objector cannot reopen the same point over again. The authorised officer,

holding that Ramadurai is the legal heir of Radhakrishna Naidu and that his right has already been declared in M.R.I. 37 (R), dated 25th November, 1970, dismissed the objection petition.

4. Aggrieved by the order of the authorised officer, the objector preferred an appeal to the Land Tribunal (Subordinate Judge of Mayuram). The Land Tribunal found that the partition deed between Ramachandra Naidu, Radhakrishna Naidu and R. G. Rajan was not before the Court, that necessary parties had not been examined by the Authorised Officer as contemplated under section 10 (5) of the Act, that the prior proceedings referred to by the authorised officer have neither been marked in these proceedings nor placed before the Court and that without the earlier proceedings before the Court, the question of *res judicata* cannot be decided. The Land Tribunal also held that the will alleged to have been executed by Ramadurai in favour of Santhakumari and Ammani Ammal had not been produced before the Court. With these findings, the Land Tribunal allowed the appeal by setting aside the order of the authorised officer and remanded the matter for fresh disposal to the authorised officer in accordance with law and also in accordance with the observations contained in the judgment of the Land Tribunal.

5. Aggrieved by the said order of remand, the petitioner herein has preferred the above civil revision petition under section 83 of Madras Act LVIII of 1961.

6. Mr. V. Sridevan, the learned counsel appearing for the petitioner and also Mr. Santhanam, who continued the arguments on behalf of the petitioner, submitted that the present proceedings M.R.I.N. 7(R) NNL (AS) are the continuation of the proceedings in M.R.I. 37 (R)/NNL. A.3., dated 13th November, 1970, that the Land Tribunal should have called for all the records and disposed of the matter itself, that it is the duty of the objector to produce evidence to substantiate his case and inasmuch as he has failed to do so, the matter should not be remanded in order to enable the objector to fill up the lacuna and that as per Order 41, rule 23, Civil Procedure Code, the Tribunal ought to have exhausted the remedies under Order 41, rule 23, Civil Procedure Code. The Tribunal ought to have exhausted the remedies under Order 41, rules 24 to 27, Civil Procedure Code, before it had remanded the matter under Order 41, rule 23, Civil Procedure Code.

7. Mr. R. G. Rajan, the learned counsel appearing for the first respondent-objector submitted that the proceedings in M.R.I. 37(R) NNL. A.3, dated 18th November, 1970 have nothing to do with the present proceedings, that the petitioner herein ought to have produced and marked all the documents she wanted to rely upon in these proceedings, that since she has failed to do so and since the authorised officer has relied upon certain documents which are not before the Court, the Tribunal has correctly remanded the matter for fresh disposal in the interest of rendering justice and that the question of invoking Order 41, rules 24 to 27, Civil Procedure Code, will not arise in this case on the facts and circumstances of the present proceedings. Mr. R. G. Rajan, also contended that there is no question of *res judicata* as such in this case, inasmuch as the objector was not a party to the previous proceedings. The finding as regards *res judicata* even without marking the previous proceedings as exhibit in these proceedings, is wrong.

8. I have been taken through the proceedings in M.R.I. 37(R) NNL. A.3., dated 18th November, 1970 and the proceedings in M.R.I. 117(R) NNL A.3, dated 31st December, 1972. M.R.I. 37(R) NNL. A3, dated 18th November, 1970 is in respect of proceedings started against the properties in the hands of Radhakrishna Naidu, Santhakumari the daughter of Radhakrishna Naidu, Ammani Ammal, the wife of Radhakrishna Naidu, and Seethalakshmi Ammal another wife of Radhakrishna Naidu. In that proceeding, the present objector was not a party. In that proceeding, a draft statement under section 10 (1) was finalised stating that Ramadurai is the son of Radhakrishna Naidu and Santhakumari and Ammani Ammal are the legal representatives of Ramadurai as per the will executed by him. As far as the

present proceedings are concerned, which is M.R.I. 117(R) NNL A.3, dated 31st December, 1972, section 10 (1) notification was made in respect of the lands in question in the name of Santhakumari and Ammani Ammal. The objector Gurumurthy wanted in his objection petition that the lands stated in his petition should be excluded from the holding of Radhakrishna Naidu as he happened to be a life estate holder. Thus it is clear that the proceedings now under question relate to a portion of the property involved in the previous proceedings. At that time when the previous proceedings were taken, Radhakrishna Naidu was alive. But his son Ramadurai died in 1967 itself. Hence it is too much for the petitioner to contend that the present proceeding is the continuation of M.R.I. 37(R) NNL. A.3., dated 18th November, 1970. I am of the view that these two proceedings are independent of each other and it is not correct to state that the present proceeding is the continuation of the previous one.

9. In the light of the above said finding of mine, it has to be seen as to whether the remand made by the Land Tribunal can be agitated in this revision petition. Mr. Santhanam, the learned counsel appearing for the petitioner cited *Annamalai* v. *Narayanaswami Pillai*[1], wherein Venkataraman, J., has held :

> " Where the trial Court has considered the evidence adduced before it and come to some conclusion the appellate Court should not normally remand the case. The appellate Court should see first whether it cannot dispose of the case itself under Order 41, rules 24, 25, 26 and 27. Only if it is not possible so to do and it is necessary in the interests of justice to remit the suit, remand should be resorted to."

From this, Mr. Santhanam, submitted that the lower appellate Court ought to have looked into the documents and if need he ought to have taken further evidence, both documentary and oral by itself and should have disposed of the matter instead of remanding the case which will enable the respondent herein to fill up the lacuna, if any. The learned counsel next cited a decision reported in *Chinnan Ambalam* v. *Ramiah Maniam*[1], wherein Venkataraman, J., has held that the remand should not be made for the purpose of enabling the party to let in additional evidence. The decision further states that the appellate Court before remand must come to the conclusion that the decree of the Court below has to be reversed. More or less to the same effect is the decision reported in *Achammal* v. *Kristama Naidu*[2]. Mr. Santhanam also cited *Athayee* v. *Shanmugha Goundar*[3] and *H. Venkatachala Iyengar* v. *B. N. Thimmajamma and others*[4], for the proposition that the burden is upon the person who prodounds the will and he ought to have discharged the said burden. The appellate Court cannot remand the case in order to give an opportunity to the propounder of the Will to let in evidence to substantiate the genuineness of the Will. *Butchamma* v. *Ramasitamma*[5], is a decision for the proposition that for mere taking of additional evidence a case should not be remanded by the appellate Court. More or less to the same effect are the decisions reported in *Ramakrishna* v. *Rangayya*[6] and *Thirumalaiswami Mudali* v. *Periasami Mudali*[7]. Order 43, rule 23, Civil Procedure Code, as per Madras Amendment reads :

> "Where the Courtmrhoow f se decree an appeal is preferred has disposed of the suit upon a preliminary point and when the appellate Court in reversing or setting aside the decree under appeal considers it necessary in the interests of justice to remand the case, the appellate Court may by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit

1. (1971) 2 M.L.J. 330 : 84 L.W. 785 : A.I.R. 1972 Mad. 316.

1. (1968) 81 L.W. 296.
2. (1968) 81 L.W. 297.
3. (1965) 2 M.L.J. 259.
4. 1959 S.C.J. 507: (1959) 1 S.C.R. (Supp.) 426 : A.I.R. 1959 S.C. 443.
5. (1953) 2 M.L.J. 392: A.I.R. 1954 Mad. 191.
6. (1954) M.W.N. 216 : A.I.R. 1954 Mad. 783.
7. (1951) 2 M.L.J. 532 : A.I.R. 1952 Mad. 66.

under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand."

No doubt, the remand should not be for a flimsy ground or without coming to the conclusion that the decree of the Court below has to be set aside or for allowing the party to fill up the lacuna as propounded in the decisions referred above. If the appellate Court, in the interests of justice, after setting aside the decree of the Court below, wants that a remand has to be made, it can do so. Normally when the appellate Court can invoke the provisions under Order 41, rules 24 to 27, Civil Procedure Code, to dispose of the matter by itself, it is not expedient on the part of the Court to remand the matter in such circumstances. But invoking Order 41, rules 24 to 27 Civil Procedure Code, is a subjective test of the Court dealing with the matter and as such the main question that has to be considered in a case filed against the order of remand is as to whether the interests of justice requires such a remand.

10. Mr. Rajan, the learned counsel appearing for the respondent-objector pointed out various provisions of the Land Reforms Act and the action to be taken by the authorities concerned. Section 8 deals with the furnishing of return by a person holding land in excess of 15 standard acres. Section 9 deals with the collection of information and section 10 deals with the preparation and publication of draft statement as regards land in excess of the ceiling area and objection is called for under section 10 (5) of the Act and finally section 12 provides for the publication of final statement. In the present case, it is only at the stage of section 10 (5) of the Act the objector came forward with the present objection. Thus it is clear that there cannot be two section 10 (1) notifications in one proceeding unless such a notification is made after remand by the higher authority. Hence to say that the proceeding in M.R.I. 117 (R)NNL. A.3., dated 31st December, 1972 is the continuation of the proceedings in M.R.I. 37(R) NNL. A.3., dated 18th November, 1970 cannot be sustained. The Tribunal in the interest of justice, thought that the authorised officer ought to have taken on file the documents referred and also the previous proceedings, before it gives any finding in favour of or against the objector concerned. On the other hand, the authorised officer seems to have assumed certain things on the basis of certain records which are not before the officer. In the absence of such records, the Tribunal thought it fit to set aside the order of the authorised officer and remand the matter for fresh disposal in accordance with law and in the light of the observations made by the appellate authority.

11. Mr. Rajan also pointed out that the present revision is filed under section 83 of the Land Reforms Act. Under section 78 of the Land Reforms Act, the Land Tribunal has power to remand a case. The provisions of the Code of Civil Procedure, will apply to the cases pending before the Land Tribunal. Since section 83, which is the section that enabled the petitioner to file this revision petition before this Court, specifically states that the disposal of the revision will be on the basis of section 115 of the Code of Civil Procedure, Mr. Rajan states there is no question of jurisdiction as such involved in this case to interfere with the order of remand, made by the Land Tribunal.

12. On the facts and circumstances of the present case, I am of the view that the Tribunal, in the interest of justice, has correctly remanded the matter to the authorised officer. Further, I do not find any error of jurisdiction as such to interfere with the order of remand passed by the Tribunal. In these circumstances, this civil revision petition is dismissed with costs.

R.S. ——— *Revision petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

S. Ramaswami Gounder ... *Petitioner**

v.

M. Pattabhiraman Chettiar .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 10 (3)—Petition for eviction by purchaser of building—Personal use and occupation after demolition and reconstruction—Agreement between seller and tenant to extend the lease up to 31st January, 1972—Agreement not registered—Sale of building on 19th January, 1970—Purchaser entitled to evict—Agreement to be enforceable ought to have been registered.

Transfer of Property Act (IV of 1882), section 53-A—Part-performance doctrine inapplicable.

The previous landlord of a building agreed with the tenant to renew the lease for a period of three years which would come to an end on 31st January, 1972. But this agreement was not registered. The building was sold on 19th January, 1970 and the purchaser filed an application for eviction on the ground of demolition and reconstruction. This was dismissed by the Rent Controller on the ground of the agreement being subsisting and was confirmed on appeal.

Held on revision:

Unless there was a registered agreement whereby specific leasehold right was conferred, it would be futile on the part of the tenant to contend that his rights as a tenant would remain unaffected. Merely acting on the unregistered agreement does not in any way mean that the tenant's right would remain secured for a further period of three years. Acting would only amount to this, that the tenant was holding over from month to month, after the efflux of the earlier registered agreement. If really the parties wanted to secure their rights so as to be enforceable as against the new purchaser who has been held to be a *bona fide* purchaser for value, there ought to have been a registered agreement. [*Para.* 4.]

The doctrine of part-performance cannot be availed of in this case since the rights as a lessee are not enforceable on the ground of the tenant having performed his part of the contract. [*Para.* 5.]

The question relating to part-performance falls into insignificance inasmuch as the tenant was only holding from month to month; therefore there is no question of any part-performance. [*Para.* 5.]

Section 10 (3) (*d*) of Act (XVIII of 1960) contemplates a valid enforceable agreement which here is not the case. [*Para.* 6.]

Cases referred to:—

R.M. Mehta v. *Hindustan Photo Films Mfg. Company*, (1976) 1 M.L.J. 115: 89 L.W. 19; *Delhi Motor Company* v. *U. A. Basrurukar*, (1968) 2 S.C.J. 614: (1968) 2 S.C.R. 720: (1968) 1 S.C.W.R. 953: A.I.R. 1968 S.C. 794; *Baldeo Singh* v. *Udal Singh*, A.I R. 1921 All. 248; *Damodar Prasad* v. *Masoodan Singh*, A.I.R. 1928 Pat. 89.

Petition under section 25 of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act (XXIII of 1973), praying the High Court to review the order of the Court of the Appellate Authority, Sub-Judge, Tiruchirapalli, in C.M.A. No. 285 of 1972, etc.

T. R. Rajagopalan and *T. R. Rajaraman*, for Petitioner.

R. Gopalaswami Iyyengar for *C. Vasudevan* and *T. S. Skandakumar*, for Respondent.

The Court made the following

ORDER:—The landlord is the revision petitioner before me. He purchased door No. 303, Jawahar Bazaar, Karur (a non-residential building) and adjacent door No. 304, under Exhibit A-7, dated 19th January, 1970, for valuable consideration from one S.V.M.M. Mohammed, with the object of demolishing and reconstructing it into a single unit and to carry on

*C.R.P. No. 1678 of 1975. 11*th March*, 1976.

his business. The respondent in this civil revision petition was a tenant of door No. 303 from its previous owner on a monthly rental of Rs. 40. Though the two shops are structurally different, they constitute a single building. Immediately after his purchase, he informed the tenant to vacate, but his request was not complied with. Hence the petition for eviction on the ground of personal use and occupation and his requirement as *bona fide.* The contest by the tenant was that he had been in the schedule premises for about 40 years and the purchase by the landlord was with the full knowledge of the tenancy rights. Originally there was an agreement under Exhibit B-3, dated 2nd February, 1966, which was for a period of three years. Thereafter, the previous landlord, *viz.*, the vendor of the present revision petitioner (S.V.M.M. Mohammad) and the tenant (the present respondent) agreed to have the tenancy renewed for a period of three years and have a registered deed executed. As per the terms of that agreement, the lease would come to an end only by 31st January, 1972, and till then the eviction was not possible. The Rent Controller dismissed the eviction petition holding that the requirement of the landlord was not *bona fide* and in any event, there was a valid and subsisting agreement from 1st February, 1969 to 31st January, 1972, and during the subsistence of that agreement, the petition for eviction was not maintainable. Against that order, the landlord (present revision petitioner) preferred an appeal to the Principal Subordinate Judge of Tiruchirappalli who, in C.M.A. No. 285 of 1973, confirmed the dismissal of the eviction petition. Aggrieved by the same, the present revision petition has been preferred.

2. Mr. T.R. Rajagopalan, learned counsel for the revision petitioner, raises the following points before me. The Courts below have erred in holding that the unregistered agreement entered into between the parties, *viz.*, S.V.M.M. Mohammad and the tenant (present respondent herein) agreeing to renew the lease for a further period of three years would amount to a subsisting lease and that on that score, the petition for eviction was not maintainable. According to the learned counsel, if really there was to be an enforceable lease as against the *bona fide* purchaser for value like the present revision petitioner, there ought to have been a registered deed. In the absence of the same, it cannot be said that any agreement would be binding upon the present revision petitioner. The resultant position would be that the tenant would be holding over from month to month and the notice of termination issued would be valid. In support of his submission, the learned counsel relies on a decision reported in *R.M. Mehta* v. *Hindustan Photo Films Mfg. Co.*[1]. The next submission of the learned counsel is that section 53-A of the Transfer of Property Act (the doctrine of part-performance) cannot be invoked in a case of this character because the tenant's right's were sought to be pressed into service only under an unregistered lease and it is not open to him to claim such right. In support of this submission, reliance is placed on *Delhi Motor Co.* v. *U.A. Basrurukar*[2].

3. In reply to these submissions, Mr. R. Gopalaswami Iyengar, learned counsel, appearing for the respondent-tenant, argues that having regard to the imperative language of section 10 (3) (*d*) of the Tamil Nadu Act (XVIII of 1960), the petition was not maintainable, as rightly held by the Courts below. According to him, for mere want of registration, it cannot be held that there was no enforceable agreement for two reasons. Section 10 (3) (*d*) does not require a registered agreement. Even otherwise, for want of registration, the rights of a lease cannot become unenforceable especially when it has been acted upon by payment of rent till 19th January, 1970, between the two parties to the agreement, *viz.*, the previous landlord (S.V.M.M. Mohammad) and the present respondent (tenant). This apart, it is open to the tenant to avail himself of the doctrine of part-performance which is put up in defence to disable the landlord from seeking an eviction and thereby dispossessing the tenant. Support is sought to be derived for these submissions from the rulings reported in

1. (1976) 1 M.L.J. 115: 89 L.W. 19.

2. (1968) 2 S.C.J. 614: (1968) 1 S.C.W.R. 953: (1968) 2 S.C.R. 720: A.I.R. 1968 S.C. 794.

Baldeo Singh v. *Udal Singh*[1] and *Damodar Prasad* v. *Masoodan Singh*[2].

4. In this case, undoubtedly, Exhibit B-3, the registered lease agreement was operative between 2nd February, 1966 and 2nd February, 1969. On 1st February, 1969, it was agreed between the previous landlord, *viz.*, S.V.M.M. Mohammad and the tenant that the lease shall be further renewed for a period of three years. This agreement, according to the lower appellate Court, was not a concocted one. That may be so. But the real question is, whether the parties contemplated a registered agreement and if that was not executed, whether it would be open to the tenant to put forth his right as a tenant on the ground that for want of registration his rights cannot be denied. In my view, unless there was a registered agreement whereby specific leasehold right was conferred, it would be futile on the part of the tenant to contend that his rights as a tenant would remain unaffected. What was agreed to between the parties was only to confer a further right of tenancy. Where such further rights were not conferred, by merely acting upon that agreement it does not in any way mean that his right would remain secured for a further period of three years. Acting would only amount to this, *viz.*, after the efflux of the agreement, Exhibit B-3, the tenant was holding over from month to month in which event, he is bound to pay rent and it is open to the landlord to accept. If that be the position, where a notice of termination had been given, which notice was otherwise valid, certainly there was a proper termination of the tenancy. If really the parties wanted to secure their rights so as to be enforceable as against the new purchaser who has been held to be a *bona fide* purchaser for value, there ought to have been a registered agreement. The learned counsel for the revision petitioner, Mr. T. R. Rajagopalan, is therefore correct in his submission. The judgment of Ismail, J., reported in *R.M. Mehta* v. *Hindustan Photo Films Mfg. Co.*[3] is clear on this aspect. There, the learned Judge has held that where the rights of lease are agreed to be renewed, such renewal will have to be by means of a registered instrument, if it were to exceed a period of one year. In this case, since it was for more than a period of one year, it has to be by means of a registered instrument.

1. A.I.R. 1921 All. 248.
2. A.I.R. 1928 Pat. 89.
3. (1976) 1 M.L.J. 115; 89 L.W. 19.

5. Neither the decision in *Baldeo Singh* v. *Udal Singh*[1] nor *Damodar Prasad* v. *Masoodan Singh*[2] is of any assistance to the tenant (respondent) *Baldeo Singh* v. *Udal Singh*[1] lays down—

> "Where an agreement has been acted upon and parties have enjoyed benefit thereunder, neither party can be allowed to resile from the agreement although it may be unregistered"

That case related to a family arrangement which, under law, does not require registration. Besides that, as pointed out earlier; the parties acting upon the unregistered agreement in this case was only as a tenant from month to month. *Damodar Prasad* v. *Masoodan Singh*,[2] lays down—

> "Even if the registration of a lease deed be invalid, the tenancy can be proved otherwise without proving the written lease which may be inadmissible for want of registration".
>
> "The tenancy can also be proved by the doctrine of part-performance".

The doctrine of part-performance cannot be availed of in this case, since as laid down by the Supreme Court in *Delhi Motor Co.* v. *U.A. Basrurukar*[3] the rights as a lessee are not enforceable on the ground of the tenant having performed his part of the contract To my mind, the question relating to part performance falls into insignificance if this position is noted, *viz.*, that the tenant was only holding over from month to month. Therefore, there is no question of any part-performance.

6. I am unable to agree with the contention of the learned counsel for the respondent, Mr. R. Gopalaswami Iyengar,

1. A.I.R. 1921 All. 248.
2. A.I.R. 1928 Pat. 89.
3. (1968) 2 S.C.J. 614: (1968) 1 S.C.W.R. 953: (1956) 2 S.C.R. 720: A.I.R. 1968 S.C. 794.

that section 10 (3) (*b*) would be a bar in this case and that section takes in any agreement. This would be reading too much into the section. That section contemplates a valid enforceable agreement, which I have found here is not the case. In this view, disagreeing with the Courts below, I hold that the landlord is entitled to an order of eviction. Accordingly the revision petition will stand allowed. The tenant will have six months time from today to hand over vacant passession. I make no order as to costs.

S J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, J.*

A. Palaniappa Maniyagar .. *Petitioner**

v.

Andiappa Maniyagar and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 23, *rule* 3—*Petition under—Court direction that it may be posted along with the suit—Not proper.*

Under Order 23, rule 3, Civil Procedure Code, the Court was bound to see whether the allegation of the parties that the suit had been adjusted wholly or in part by any lawful agreement or compromise, was true or not.

[*Para.* 1.]

In the instant case, the parties had filed a petition under Order 23, rule 3, Civil Procedure Code. But the Court directed it to be posted along with the suit.

Held: on revision:

The lower Court mis-directed itself when it refused to decide the question of adjustment in the petition under Order 23, rule 3, Civil Procedure Code, and directed the same to be posted along with the suit.

[*Para.* 1.]

The order of the Court below was set aside and the matter remitted to the District Munsif's Court to decide on the evidence already on record whether the satisfaction pleaded or the adjustment put up was true or not.

[*Para.* 2.]

Petition under section 115 of Act (V of 1908) praying the High Court to revise the order of the Court of the District Muisif (Principal), Dharmapuri, dated 21st October, 1972 and made in I.A. No. 96 of 1972, in O.S. No. 444 of 1959.

T. R. Rajagopalan, for Petitioner.

S. Nainar Sundaram, for Respondents 7 to 14.

The Court made the following

ORDER:—The lower Court misdirected itself when it refused to decide in a petition under Order 23, rule 3, Civil Procedure Code, and directed the same to be posted along with suit. Under Order 23, rule 3, Civil Procedure Code, the Court is bound to see whether the allegation of the parties that the suit has been adjusted wholly or in part by any lawful agreement or compromise, is true or not.

2. In the instant case, the parties not only filed a compromise memo. but let in evidence to show that there was an adjustment outside the Court which was in pursuance of a lawful agreement. The Court is bound to enquire into it and find whether the adjustment as claimed is true or not. If it is so satisfied, it shall record the compromise and pass a decree in terms thereof. There is of course, no indication in Order 23, rule 3, Civil Procedure Code, as to what has to be done by the Court when it is not satisfied that there was such an adjustment as pleaded. Obviously, if the Court after enquiring into such petition for recording compromise is satisfied that there was no such adjustment and that there was no lawful agreement or compromise from which the alleged adjustment could be said to flow from, then it has

*C.R P. No. 1223 of 1973.

29th April, 1976

the jurisdiction to dismiss the said petition. In any event, the Court has to pass an order on the said petition and make a decision thereon, the failure of which amounts to non-exercise of jurisdiction. The Court ought not to have posted the petition along with the suit but ought to have decided the same. In this view the order of the Court below is set aside and the matter remitted to the District Munsif's Court, Dharmapuri, for the Court to decide on the evidence already on record whether the satisfaction pleaded or the adjustment put up is true or not No costs. If it is satisfied that there was no such adjustment, it shall proceed with the old suit and dispose of the same before September, 1976.

S.J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Veeraswami, C.J. and S. Suryamurthy, J.*

Bherumal Hotchand .. *Appellant.**

v.

P.V. Gandhi and others .. *Respondents*

Presidency Towns Insolvency Act (III of 1909), section 56, 9 (c)—Transfer by insolvent of stock-in-trade in favour of guarantor—Transfer made within ten days before application for adjudication—Transfer liable to be set aside as faudulent preference as against Official Assignee.

The insolvent firm was dealing in textiles and ran into debts. It transferred its stock-in-trade to its guarantor on 7th August, 1971. On 16th August, 1971 one of the creditors of the firm filed an application for adjudication of the firm as insolvent under section 9 (*b*) and (*d*) of the Presidency Towns Insolvency Act, and it was adjudicated an insolvent on 1st December, 1971, under section 9 (*c*), declaring the transfer made by it as fraudulent preference and void under section 56 as against the Official Assignee.

On appeal by the guarantor,

Held· There could be no doubt that the transfer was hit by section 56.

[*Para.* 2.]

All the facts required for the application of section 56 read with section 9 (*c*) were satisfied. The lower Court was, therefore, right in setting aside the transfer as fraudulent preference and void as against the Official Assignee.

[*Para.* 6.]

Case referred to:—

Lakshman Chettiar v. *Jayarama Chettiar*, (1971) 2 M.L.J. 292: 84 L.W. 494: A.I.R. 1972 Mad. 34.

Appeal under Clause 1, Letters Patent against the order of Palaniswami, J., in I. P. No. 56 of 1971.

R. Krishnaswami, for Appellant.

The Official Assignee, for 6th Respondent.

The Judgment of the Court was delivered by

Veeraswami, C.J.—The appellant herein is a guarantor and transferee of the stock-in-trade and business of the insolvent Messrs. Gitanjali, a firm of partnership. The firm was dealing in textiles and it ran into debts. It had an overdraft account with the Bank of India. The eventual balance found due to the bank from the insolvent as on 7th August, 1971, was found to be Rs. 1 lakh. The firm also had other debts, its total liabilities approximately amounting to Rs. 3,38,015. On 7th August, 1971, the insolvent transferred its entire assets consisting of the stock-in-trade and the business in textiles to the appellant for a consideration of Rs. 1,12,000. Out of this consideration, the appellant retained with himself a sum of Rs. 1 lakh for payment to the Bank of India and the balance of Rs. 12,000 he paid to the firm, which the managing director of the firm utilised for his own personal purposes. One P.V. Gandhi, one of the respondents before us filed a petition on 16th August, 1971, for adjudicating the firm as insolvent under section 9 (*b*) and (*d*). Actually it was adjudicated as an insolvent on 1st December, 1971, but this was in effect done under section 9 (*c*), the Court holding that the transfer was a fraudulent preference and should be deemed under section. 56 to be fraudulent and void as against the Official Assignee.

*O.S.A. No. 59 of 1971.

9th *February*, 1976.

2. The only question before us is whether the transfer, in the circumstances mentioned by us, could be regarded as fraudulent and as one hit by section 56. It seems to us that there could be no doubt that the transfer is so hit.

3. In *Lakshman Chettiar* v. *Jayarama Chettiar*[1] which was concerned with section 53 of the Transfer of Property Act, this Court pointed out that where a debtor has several creditors and some property, and if he transfers the property to one of the creditors without any further circumstances appearing, that might be a preference, but it could not be said to be a fraudulent preference; normally, it is not improper for a debtor to prefer his creditor among the many in order to discharge his debt by transfer of property; in order to make a transfer a fraudulent one, there should be something more than mere preference and the facts must establish that the preference is a fraudulent one.

4. That principle might apply if section 9 (*c*) of the Presidency Towns Insolvency Act stood by itself, because that section merely speaks of fraudulent preference. But section 56 which deals with avoidance of preference in certain cases lays down, when a transfer shall be regarded as a preference and a fraudulent preference which will be void against the Official Assignee. Any transfer, when made by a person unable to pay his debts as they become due is with a view of giving the transferee a preference over the other creditors; such transfer, if such person is adjudged insolvent on a petition presented within three months after the date of such transfer will be deemed fraudulent and void as against the Official Assignee.

5. The language of the section admits of no doubt whatever. If the facts fall within the compass of the section, no discussion or speculation is called for to find whether the transfer is a fraudulent preference, void in its effect.

6. In the instant case, the transfer was on 7th August, 1971. The adjudication of the insolvent made on 1st December, 1971, relates back to 16th August, 1971, the date of presentation of the petition for adjudication. The insolvent had a number of debts, one of them being due to the Bank of India. The guarantor also was an obligee so far as the insolvent was concerned. All the facts, therefore, required for the application of section 56, read with section 9 (*c*) are satisfied. The learned Judge was, therefore, right in setting aside the transfer as fraudulent preference and void as against the Official Assignee.

7. The appeal is dismissed with costs. We are informed that the appellant pursuant to the interim order of this Court has deposited with the Official Assignee a sum of Rs. 1,57,000. The guarantor will, of course, stand on line for rateable payment before the Official Assignee on proof of his debts to his satisfaction.

S.J. ——— *Appeal dismissed.*

1. (1971) 2 M.L.J. 292: 84 L.W. 494: A.I.R 1972 Mad. 34.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Veeraswami, C.J. and S. Natarajan, J.*

Sri Gopaldas Dwarakadas Family Trust Estate, Trichi, by its Managing Trustee, Srirangam .. *Appellant**

v.

The State of Tamilnadu, by the Secretary to Government, Revenue Department, Madras-9 and another .. *Respondents.*

Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), *Rule 8—Trust—Service of notice —Service on managing trustee sufficient notice — Service on each trustee not essential.*

Wherever a statute provides for service of notice, it is not a technicality but one of substance and whether a notice has been sufficiently served is to be decided in the light of the facts of each case. Whereas in the instant case ceiling on land was the subject and a trust is

*W.A. No. 30 of 1974. 11*th September*, 1975.

nvolved, obviously service could be effected on the trust by serving the notice on the managing trustee who does represent the trust even under the provisions of the scheme relating to it as in him the management is vested or in each of the trustees. Service on each of the trustees however is not essential for constituting a proper or sufficient service. The managing trustee having appeared and objected that he had no notice, it was obvious that he had notice of the proceeding and the whole purpose of the notice was served by his conduct that way.

[*Para.* 3.]

Appeal under Clause 15, Letters Patent, against the order of Ismail, J., dated 8th October, 1973, in W.P. No. 585 1972.

K. C. Rajappa, for Appellant.

The Government Pleader, for Respondent.

The order of the Court was made by

Veeraswami, CJ.—The appeal is from an order of Ismail, J., who dismissed *in limine* the appellant's petition under Article 226 of the Constitution of India. Proceedings were initiated under the provisions of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act of 1961 The appellant is a trust, Sri Gopaldas Dwarakadas Family Trust Estate, represented by its managing trustee. This is governed by a scheme of management settled by Court. Section 10 of the Act relates to the preparation and publication of draft statement as regards land in excess of the ceiling area. Sub-section (5) of the section lays down the procedures as to publication of the draft statement and service thereof on the persons concerned, the tenants, creditors and all other persons, who, in the opinion of the authorised officer, are interested in the land in which such draft statement relates. The service will require certain things to be done with which aspect we are not at the moment concerned. The rule corresponding to service is rule 8, which prescribes the manner of service of notice or order under the Act or the Rules. Clause (*a*) prescribes the mode of service on any company, society or association of individuals, whether incorporated or not, and then proceeds to name the officer or person on whom notice will have to be served. The other clause, which is relevant, is Clause (*d*) dealing with service in the case of an individual person. In that case, service will be by delivering or tendering the notice or order to the person concerned or his counsel or authorised agent, or by delivering or tendering the notice or order to some adult member of the family; or by sending the notice or order to the person concerned by registered post acknowledgment due; or if none of those modes of service is practicable, then service by affixture is permitted. 'Authorised agent' is also defined in the rules as a person holding a power of attorney authorising him to act on behalf of his principal or an agent empowered by written authority under the hand of his principal. The managing trustee of the appellant trust says that he had not been served in accordance with rule 8. But, the records which were summoned up to this Court show that the managing trustee, who now represents the appellant trust, as a matter of fact, appeared before the concerned authority and raised objection of there having been no notice to him. The records also show that notice was served in the office of the trust. Ismail, J., thought that there was no substance in the objection as to no notice, and on that view he dismissed the petition of the appellant *in limine*, as already mentioned.

2. We are of the same opinion. Mr. Rajappa, counsel for the appellant, strongly urges that since there are more than one trustee, service will have to be done on every one of them, and in this case there was not even service on the managing trustee. He would add that service on the office of the trust would not be sufficient in view of the terms of the provisions of the Act and the rule above cited. Our attention was directed by counsel to certain passages in Lewin on Trust to show that in the case of a trust represented by a number of trustees in whom the property is vested, each of the trustees will have to be served and his objection in each case will have to be considered. But the passages also show that this is not an inflexible rule.

3. Whereever a statute provides for service of notice, it is not as a ritual, but it is intended to draw the attention of the person interested or concerned in

the proceeding, so that he could have his say either in writing or in person, as the case may be, in accordance with the statutory or other rule having the force of law. The whole purpose of notice is to inform the person or persons concerned and allow him or invite him to defend himself or themselves if they are so minded. It is, therefore, not a technicality but one of substance and whether notice has been sufficiently served is to be decided in the light of the facts of each case. Where, as in this case, ceiling is the subject and a trust involved, obviously service can be effected on the trust by serving the notice on the managing trustee, who does represent the trust even under the provisions of the scheme, as in him the management is vested or in each of the trustees. We must, however, point out that service on each of the trustees is not essential for constituting a proper or sufficient service. The managing trustee, having appeared and objected that he had no notice, it is obvious that he had notice of the proceeding and the whole purpose of the notice was served by his conduct that way. Instead of saying that he had no notice served on him, which was only a formality, he should have raised his objection in relation to the draft scheme. The objection that is now taken, in view of his conduct, appears to us be frivolous and he has only wasted the funds of the trust by coming to this Court which again shows that he is fully alive to the draft scheme. The petition under Article 226 of the Constitution, in our opinion, was, therefore, rightly dismissed. The appeal fails and is dismised with costs. Counsel's fee, Rs. 100.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao* and *S. Ratnavel Pandian, JJ.*

P. Somasundaram ... *Appellant**

v.

K. Rajammal .. *Respondent.*

Indian Succession Act (XXXIX of 1925), section 119—Will—Construction—Grant of life interest followed by an absolute estate—Vesting of absolute estate whether takes place immediately on the death of testator—Interest vested and not contingent.

S made a will, dated 27th April, 1913, bequeathing a life interest in favour of *P*, *C* and *V* and after their lifetime *V* and her heirs were to get their properties absolutely. *P* died on 11th February, 1951 and *C* died on 20th July, 1955. *V* had made a will dated 23rd February, 1949, in favour of the defendant. The plaintiff challenged the validity of the will on the ground that *V* had no vested interest in the properties during the lifetime of *P* and *C*.

Held, There could be no vacuum or interregnum where there was a life estate followed by an absolute estate, because the absolute estate must vest somewhere. In this case, what was deferred was only the possession of the entire properties in favour of *V* and not the vesting of the properties. Under section 119 of the Indian Suceession Act, the vested interest in the suit properties had devolved on *V* on the death of the testator subject to the charge for maintenance in favour of herself, *P* and *C*, which charge of maintenance would not suspend the vesting of the properties of the legatee *V*.

[*Para.* 7.]

An interest is said to be vested when it is not subject to any condition precedent, when it is to take effect on the happening of an event which is certain; whereas an estate is contingent when the right to enjoyment depends upon the happening of an uncertain event which may or may not

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*Appeal No. 522 of 1970.

29th November, 1974.

happen. In this case, since the death of *P* and *C* were certain, *V* had acquired a vested interest in the properties on the death of the testator and section 119 of the Indian Sucession Act clearly applied. [*Para.* 11.]

Cases referred to:—

Bhagabati Barmani v. *Kalicharan Singh*, (1911) I.L.R. 38 Cal. 468; *Hilaso* v. *Munilal*, (1911) I.L.R. 33 All. 558; *Philip Graham Greenwood* v. *Philip Graham Green wood*, 181 I.C. 355: A.I.R. 1939 P.C. 78; *Hazara* v. *Barta Singh*, A.I.R. 1960 Punj. 257; *Sreechand Sowcar* v. *Kasi Chetti*, 38 L.W. 860: 147 I.C. 383: A.I.R. 1933 Mad. 885; *Satupuri Narayanamma* v. *Kadiyala Venkatasubbiah*, (1973) 1 S.C.C. 801: (1973): 1 S.C.W.R. 715: (1973) S.C.D. 542: A.I.R. 1973 S.C. 2114.

Appeal against the decree of the Sub-Court, Madurai, in O.S. No. 187 of 1966.

V. S. Subramaniam, for Appellant.

S. Sampath Kumar and *S. Rangarajan,* for Respondent.

The Judgment of the Court was delivered by

Ratnavel Pandian, J.—This appeal is preferred *in forma pauperis* by the unsuccessful plaintiff in O.S. No. 187 of 1966 on the file of the Court of the Subordinate Judge, Madurai. The said suit was filed by him *in forma pauperis* for possession with past and future mesne profits.

2. This litigation arose out of a will executed by one Velammal under Exhibit B-34, dated 23rd February, 1949, in favour of the respondents-defendant. The plaintiff in the suit questions the right and title of the testatrix to the suit properties. The relationship of the parties and their position can be appreciated from the following genealogical tree:—

Diraviyam Chettiar
- Arunachalam
  - Palvannan Chettiar
    - P. Somasundaram (plff.)
  - Subramaniam Chettiar (no issue)
- Annamalai Chettiar (no issues)
- Seeni Chettiar — Piramu Ammal
  - Chockalingam (son) (died)—Chellammal
    - Velammal

The suit properties originally belonged to one Seeni Chettiar, son of Diraviyam Chettiar. The said Seeni Chettiar had two brothers, *viz.*, Arunachalam Chettiar (the eldest) and Annamalai Chettiar (the youngest). Annamalai Chettiar died issueless. Arunachalam Chettiar died leaving him two sons Palvannan Chettiar and Subramaniam Chettiar. Subramaniam Chettiar also died issueless. The plaintiff in this suit is the son of the said Palvannan Chettiar. The said Seeni Chettiar, (sic) the paternal grandfather of the plaintiff, executed a will, Exhibit A-1 dated 27th April, 1913. bequeathing life interest in favour of his wife, Piramu Ammal and daughter-in-law Chellammal with a specific term that his daughter-in-law, Chellammal and, his grand-daughter Velammal were also to reside with his wife Piramu Ammal and maintain themselves out of the income from the properties in common, with no powers of alienation.. Velammal was to enjoy the properties in common with Piramu Ammal and Chellammal till their lifetime and thereafter, Chellammal and her heirs were to get the properties absolutely. There is no dispute on the abovesaid facts. It is the case of the plaintiff that under the will, Exhibit A-1, Velammal got only a right of maintenance during the lifetime of Piramu Ammal and Chellammal and not any vested interest or remainder in the properties. After the death of the testator of Exhibit A-1, Piramu Ammal was in possession and enjoyment of the suit properties as per the terms of the will, and Chellammal and Velammal also were maintained by Piramu Ammal out of the income of the bequeathed properties, Velammal the testatrix of Exhibit A-34, died issueless on 22nd February, 1951, after the death of her husband. Subsequently, Piramu Ammal died on 11th February, 1951 and Chellammal died on 20th July, 1955. So, the plaintiff's case is that, Velammal, the testatrix of Exhibit B-34, had absolutely no vested interest right or title to the property especially during the lifetime of Piramu Ammal and Chellammal, and so the alleged will is void *ab initio*. The plaintiff's further case is that Exhibit B-34 has not been executed while in a sound and disposing state of mind and that the defendant, the legatee under the will, with the able assistance and help of her husband, partisans and friends, had exerted undue

influence and coercion on the testatrix, to execute the will and so it is vitiated by fraud, undue influence and coercion. Thus the plaintiff claims that as per Exhibit A-1, he has become entitled to suceed the suit properties and to be in possession and enjoyment of the same. He challenges the occupation and possession of the suit properties, by the defendants as illegal. He sent a notice under Exhibit A-5, dated 4th July 1964 to which the defendants sent a reply under Exhibit B-32, dated 11th July, 1964.

So the plaintiff filed the suit for a declaration that he is entitled to the suit properties, and consequently, to recover possession thereafter from the defendant and for past mesne profits of Rs. 3,600 and future mesne profits and costs of suit.

3. The respondent-defendant resisted the claim of the plaintiff, stating that the plaintiff is not a reversioner of the deceased Seeni Chettiar, entitled to succeed to the suit properties, and that Velammal, who had an absolute vested right over the properties on the strength of Exhibit A-1, has executed Exhibit B-34 in favour of the defendant of her own free will and volition while she was in a sound and disposing state of mind and that the appellant herein knowing fully well of the execution of Exhibit B-34, has been keeping quiet from 1949 till December, 1965 for a period of over 15 years and then has come forward with this false claim after the death of the defendant s husband. The defendant has further stated in her written statement that the said Velammal lived for two years after the execution of the will under the care and protection of the defendant Rajammal who is no other than her maternal aunt's daughter. Further, the defendant had also taken a plea that the suit is barred by limitation as the plaintiff had not taken any appropriate proceedings to set aside the said will, Exhibit B-34. The defendant also pleaded that she is paying municipal tax from the year 1951 and attending to all the repairs, that the plaintiff is estopped from claiming the suit properties by his own laches, negligence and acquiescence and as such he has no cause of action and that the suit is also bad for non-joinder of parties.

4. On the above pleadings, the following issues were framed by the trial Court.—

(1) What is the nature of interest obtained by Velammal under the will of her grandfather Seeni Chettiar, dated 27th April 1913.

(2) Whether Velammal get only a right to maintenance under the will.

(3) Whether the will, dated 23rd February, 1949, executed by Velammal is, true, genuine, valid and binding on the plaintiff.

(4) Whether the plaintiff is estopped from impugning the will of Velammal by his own laches, negligence and acquiescence.

(5) Whether any and what improvements have been made by the defendant to the suit building.

(6) Whether the suit as framed without a declaration regarding Velammal's will is not maintainable.

(7) Whether the defendant has in any event acquire prescriptive title to the suit properties.

(8) Whether the plaintiff is entitled to any and what mesne profits.

(9) Whether the suit is barred by limitation.

(10) Whether the suit has been properly valued and proper Court- fee paid.

(11) To what relief, if any, is the plaintiff entitled ?

Additional issues were framed on 28th October, 1967.

(1) Whether the plaintiff is the only nearest reversioner to the deceased Seeni Chettiar and if not whether the suit is maintainable.

(2) Whether the suit is bad for non-joinder of Gomathi Ammal and minor Palani *alias* Ramasubramanian.

5. After considering in great detail the oral and documentary evidence adduced by the plaintiff and the defendant in support of their respective contentions, and finding issues 1 to 8 against the plaintiff, the learned Subordinate Judge held that Velammal had got a full and absolute right over the suit property and not merely a right of maintenance that Exhibit B-34 is a true and genuine document executed by Velammal in a sound and disposing state of mind and it is valid and

binding on the plaintiff, that the defendant has also acquired title to the property by adverse possession and that the plaintiff is disentitled to impugn the will, Exhibit B-34, by his own laches, negligence and delay. He found issues 9 and 10 and additional issues 1 and 2 against the defendant as the defendant did not press those issues. Ultimately, the learned Judge dismissed the suit with costs. It is as against this judgment and decree that the plaintiff has come forward with this appeal.

6. Mr. V.S. Subramaniam, learned counsel for the appellant sought to contend before us, *firstly* that under the will, Exhibit A-1, executed by Seeni Chettiar, Velammal, the testatrix of Exhibit B-34, had got only a right of maintenance during the lifetime of Piramu Ammal and Chellammal, and not any vested right or remainder in the properties during their lifetime, but only a contingent interest over the properties and that therefore, Velammal could not validly execute the will, Exhibit B-34, and it is void *ab initio*. *Secondly*, he would contend that the propounder, the defendant, has not adduced any satisfactory and reliable evidence that at the relevant time of the execution of Exhibit B-34, the testatrix Velammal was in a sound and disposing state of mind and she signed the will of her own free will understanding the nature and effect of the disposition. He further contended that the husband of the defendant, who is an interested party, has taken a prominent and leading part in the execution of the will, Exhibit B-34, which conferred on the defendant a substantial benefit, that the attestors of the will, *viz.*, D.Ws. 2 and 3 are the co-employees of the husband of the defendant, and D.W. 1 is a friend of the defendant's husband Muthuswami Pillai, and that all these circumstances create a legitimate suspicion which is not completely removed by the defendant to enable the Court to hold that the document by the testatrix of her own free will and volition, uninfluencd by any pressure on the part of the defendant.

7. Coming to the first contention that under Exhibit A-1, Velammal got only a right of maintenance during the lifetime of Piramu Ammal and Chellammal and not an absolute vested right over the property, that the right she acquired was only a contingent interest, that is to say, she would get a vested interest over the properties only after the lifetime of Piramu Ammal and Chellammal and that since Velammal predeceased Piramu Ammal and Chellammal, she had not acquired any absolute interest, right or title over the properties when she executed Exhibit B-34, it is not disputed that Velammal predeceased Piramu Ammal and Chellammal. But, the question is whether Velammal got a vested interest under Exhibit A-1 even during the lifetime of Piramu Ammal and Chellammal. Section 119 of the Indian Sucerssion Act reads as follows:—

> "Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.
>
> *Explanation*: An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed or, whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go ever to another person".

The recitals in Exhibit A-1 read as follows:—

> ஷெ செல்லம்மாளும் மைனர் மலயம்மாளும் என் சம்சாரத்துடன் குடும்பத்தில் இருந்துகொண்டு குடும்ப சொத்துக்கு பொதுபாத்யஸ்தர்களாக இருந்து குடும்ப சொத்தின் வரும்படியை கொண்டு காலக்ஷேபம் செய்து வர வேண்டியது. ஷெ சொத்துக்களை என் சம்சாரம், செல்லம்மாள், இவர்கள் எவ்வித பராதீனமும் செய்ய பாத்தியதை இல்லை. ஷெ இருவர்களின் ஜீவதசைக்குப்பின் ஷெ மலயம்மாளும் அவளுடைய வாரிசுகளும் சர்வ சுதந்திர

பாத்தியத்துடன் ஆண்டு அனுபவித்துக் கொள்ளவேண்டியது.

From the above recitals in Exhibit A-1, the intention of the testator is clear and unambiguous that all the three, *viz.*, Piramu Ammal, Chellammal and Velammal have to maintain themselves out of the income of the properties during the lifetime of Piramu Ammal and Chellammal. Piramu Ammal and Chellammal had no rights of alienation. After the lifetime of Piramu Ammal and Chellammal, Velammal should get the properties absolutely. So on the construction of the will, the words of futurity, *viz.*, 'after the lifetime of Piramu Ammal and Chellammal' used in the will, have to be construed as merely referring to the period of determination of the life interests of the testator's wife and daughter-in-law, as there are no other contrary terms in the will showing an intention on the part of the testator postponing the vesting till after the death of the life estate holders. There cannot be a vacuum or interregnum where there is a life estate followed by an absolute estate, because the residue must rest somewhere. In this case, what is deferred is only the possession of the entire properties in favour of Velammal and not the vesting of the properties. Piramu Ammal and Chellammal were given only a life interest, with a right to enjoy the properties as is clear from the recital that they have no right of alienation. In addition to the vesting of property in Velammal, she also acquired a right to enjoy the properties along with Piramu Ammal and Chellammal. So, under section 119 of the Indian Succession Act, the vested interest in the suit properties had devolved on Velammal on the death of the testator subject to the charge of maintenance in favour of herself, Piramu Ammal and Chellammal, which charge of maintenance created under the will would not suspend the vesting of the properties of the legatee, Velammal.

8. In *Bhagabati Barmani* v. *Kalicharan Singh*,[1] a Hindu testator, left a will, giving possession of the properties, movabe and immovables, to his wife and mother for their lives and on their death to the sons of his sisters who were in existence and also those who might be born thereafter, who should hold the properties in equal shares. The testator died the day following the execution of the will. It was held that the will gave to the sons of the sisters a vested interest in their respective shares at the testator's death, though it postponed their possession and enjoyment until the deaths of the mother and widow. In *Hilaso* v. *Munilal*,[1] one Sewaram executed a will whereby he gave all his properties, after the death of himself and his wife, Mst. Mandu to his daughter Bilaso and his nephew Dulichand. Dulichand survived the testator, but predeceased Mst. Mandu. A suit was brought by the heirs of Dulichand to recover his share of the properties of Sewaram from Mst. Hilaso. The sole question that was raised in the appellate Court was whether Dulichand did not get a vested interest in the properties disposed of by the will, but merely a contingent interest, and he having died before his aunt, Mst. Mandu, whether his sons were not entitled to succeed to the property. Following the decision in *Bhagabati* v. *Kalicharan*[2], it was held that the nephew Dulichand took a vested interest in the properties, which was transmissible to his heirs. In *Phillip Graham Greenwood* v. *Phillip Graham Greenwood*[3] a testator, by his will, appointed his wife and nephew as his trustees and executors and gave all his properties to the trustees, upon certain trusts under which the wife was to enjoy the free use and income of his estate during his life. The will further empowered the wife to dispose of, at the time of her death, 1/3rd share in the whole estate in favour of any person, and as regards the 2/3rds of the estate remaining undisposed of at the time of the wife's death, the will directed that the surviving trustees should divide the 2/3rds share equally among all the brothers and sisters of the testator alive when the will was made and that should any of them predecease his wife, then the share which the deceased would have received if alive should be given to the child or children of the deceased. In that case, one of the sisters of the testator, who had survived the testator, died unmarried and

1. (1911) I.L.R. 38 Cal. 468.

1. (1911) I.L.R. 33 All. 558.
2. (1911) I.L.R. 38 Cal. 468.
3. 181 I.C. 355: A.I.R. 1939 P.C. 78.

without issue during the lifetime of the testator's widow. On the death of the widow, the period for the distribution of the 2/3rds of the residuary estate given to the testator's brother and sisters having arrived, the question arose whether the estate of the deceased sister was entitled to a share in the distribution. In was held that the deceased sister's share of the residue vested in her on the death of the testator subject to the divestiture only in the event of her predeceasing the testator's widow, leaving child or children, and such event not having occurred, her representative was entitled to her share. Thus, it is clear that the right to the 2/3rd share of the residuary estate vested in the brother and sisters of the testator upon his death in spite of the fact that the distribution of the said share among them was to take effect only after the death of the testator's widow.

9. In *Hazara* v. *Banta Singh*[1], under a will, a testator bequeathed to *A*, *B* and *C*, equal shares in his estate. It was provided that *A* and *B* were not to alienate the properties in any way execpt for the payment of their share of the debt of the testator and were to keep the property only till their lives and for their maintenance. After the death of *A* and *B*, their shares also were to go to the share of *C*. *C* died during the lifetime of *A* and *B*. It was held, following the decision in *Phillip Graham Greenwood* v. *Phillip Graham Greenwood's case*[2] and *Hilaso's case*[3], that the will gave to *A* and *B* nothing more than a life estate and it could not be interpreted to confer an absolute estate on them and that *C's* interest in the property bequeathed to him was a vested one which devolved on his heir on his death even during the lifetime of *A* and *B*.

10. The last mentioned case is directly applicable to the facts of this case. From the principles enunciated in the abovesaid decisions, it is very clear that the provisions of the will in the present case leave no doubt that the testator intended to give only a limited estate in favour of Piramu Ammal and Chellammal during their lifetime for the purpose of their maintenance, by expressly providing that they were not entitled to alienate the properties in any manner.

11. The learned counsel for the appellant contended that the will must be interpreted as creating a contingent interest in Velammal and that since Velammal died during the lifetime of Piramu Ammal and Chellammal, no interest vested in Velammal and that therefore Exhibit A-34 was void *ab initio* and the property must devolve only to the reversioner, *viz.*, the plaintiff. An interest is said to be vested when it is not subject to any condition precedent, when it is to take effect on the happening of an event which is certain; whereas an estate is contingent when the right to enjoyment depends upon the happening of an uncertain event which may or may not happen. A person takes a vested interest in property at the testator's death when he acquires proprietary right in it at that time; but the right of enjoyment is only deferred till a future event happens which is certain to happen. But, a contingent interest is one in which neither any proprietary interest nor a right of enjoyment is given at the testator's death; but both depend upon future uncertain events. In this case, since the deaths of Piramu Ammal and Chellammal were certain, Velammal had acquired a vested interest in the properties on the death of the testator Seeni Chettiar, section 119 of the Indian Succession Act clearly applies. In the absence of any contrary contention by no stretch of imagination can it be said that Exhibit A-1 created only a contingent interest, and the argument advanced by the learned counsel for the appellant is ununderstandable.

12. The distinction between vested and contingent interests has been very clearly made out in a decision rendered by a Division Bench of this Court, consisting of Sundaram Chetti and Walsh, JJ., in *Sreehchand Sowcar* v. *Kasi Chetti*[1], where the testator bequeathed his property to two persons for life and the remainder absolutely in favour of a specified class of persons on the termination of the life estate. It was held by their Lordships,

1. A.I.R. 1960 Punj. 257.
2. 181 I.C. 355: A.I.R. 1939 P.C. 78.
3. (1911) I.L.R. 33 All. 558.

1. 38 L.W. 860: 147 I.C. 383: A.I.R. 1933 Mad. 885.

that on the death of the testator the property became vested in that class and that the mere fact that they were not entitled to an immediate possession did not make it a contingent bequest.

13. Learned counsel for the appellant cited a decision of the Supreme Court in *Sarupuri Narayanamma* v. *Kadiyala Venkatasubbiah*[1], in support of his contention that the legatee Velammal could not claim the properties when she had predeceased her mother and grandmother. In that case, the instrument which came for interpretation was a gift deed. As per the terms of the gift deed, one Raghavamma and her daughter Venkatasubbamma were to take immediate possession of the property for their maintenance and were to enjoy the income from the properties alone and only after Raghavamma's death, Venkatasubbamma was to get the property absolutely. It was not a case of an immediate conferment of absolute title on Venkatasubbamma. Further, as per the terms of the settlement deed, it was arranged that in case no female or male issue was born to Venkatasubbamma, the property should on her death pass to the settlors or their descendants and not to the heirs of the said Venkatasubbamma. In view of the above peculiar facts and on the interpretation of the various clauses of the gift deed in that case, the Supreme Court held that Venkatasubbamma predecesing her mother, did not acquire any absolute interest in the property. But, the facts of the present case are very clear and quite different from the facts of the abovesaid Supreme Court case. Moreover, in this case we are directly concerned with the applicability of the statutory provisions of the Indian Succession Act to the terms of the will wherein the intention of the testator to confer an absolute vested interest on Velammal is clearly made out. So, after giving our best consideration to the facts of the present case in the light of the decisions cited above, we are definitely of opinion that the will, Exhibit A-1, in the present case conferred only a life estate on Piramu Ammal and Chellammal and the vested interest devolved on Velammal immediately after the death of Seeni Chettiar, the testator of Exhibit A-1, though the defendant would acquire the right to possession of the properties only on the death of Piramu Ammal and Chellammal,

* * *

[The discussion of facts is omitted: Ed.]

I find from the endorsement of the Sub-Registrar on Exhibit B-34 that the testatrix had admitted the execution of the will before him. D.W. 3 states that at the time of the registering of the will, Chellammal, one of the life estate holders had also come to the Sub-Registrar's office along with others. It is the evidence of the witnesses, D.Ws. 1 and 3 that Velammal herself read through the will before the execution, she being literate The testatrix was alive for about 2 years even after the execution and registration of the will. If undue influence, coercion or fraud had in fact been exerted on her, she would have cancelled that will during the said period of two years. It is common knowledge that in matters relating to the execution of a will in respect of family properties, only persons who are related and interested in the welfare of the family would participate. There is absolutely no evidence of any surrounding circumstance to infer that Muthuswami Pillai, the husband of the defendant, had exerted any undue influence, coercion or fraud in the execution of the will. Similarly, there is nothing wrong in the legatee's husband's friends and co-employees being taken as the attestors and witnesses if their action is not otherwise tainted. As we have already pointed out, the attestors D.Ws. 1 to 3 are respectable witnesses and their evidence is worthy of credence. The testatrix had executed the will in favour of the defendant who is none other than her mother's sister's daughter and the recital in the will also is that the defendant was looking after the welfare of the testatrix and it was only in consideration of all those circumstances the will has been executed in favour of the defendant This fact has not been controverted by the plaintiff by adducing proper evidence.

14. Moreover, Rajammal, the legatee under Exhibit B-34, had been paying the house-tax under Exhibits B-12 to B-22 from 1952 to 1965 as per the

1. (1973) 1 S.C.C. 801: (1973) 1 S.C.W.R. 175: 1973 S.C.D. 542: A.I.R 1973 S.C. 2114.

demand notices Exhibit, B-23 to B-31. Exhibit B-1 is the certified copy of the house-tax demand register in the name of the defendant for the years 1951 to 1960 and it has been transferred to the name of the defendant in the year 1951. It must be noted that Velammal died in the year 1951. The defendant had also made some improvements to the house as per Exhibit B-6, the blue-print submitted to the municipality and Exhibits B-37 to B-40 are the relevant records pertaining to the sanction accorded by the municipality. The plaintiff, who was admittedly residing in the same locality, had not raised his objection during those relevant periods. In view of our finding that the defendant, as the legatee under Exhibit B-34, has acquired valid title to the suit properties, the question of adverse possession does not arise. However, since the defendant had been in possession of the suit properties for more than the statutory period of 12 years, to the knowledge of the plaintiff before suit, we find that even otherwise the defendant has acquired title to the properties by adverse possession. From the foregoing discussion, we find that the ingredients of section 63 of the Indian Succession Act, and section 68 of the Indian Evidence Act have been satisfactorily complied with in proving the execution and attestation of the will, Exhibit B-34.

15. Coming to the brass tacks, Velammal had acquired vested interest in the suit properties on the death of the testator under Exhibit A-1, Seeni Chettiar, and there is no evidence, either documentary or oral, on the side of the plaintiff creating any suspicious circumstances so as to invalidate the execution of the will, Exhibit B-34, by Velammal in favour of the defendant, but contary to that, there is overwhelming, unassailable and acceptable evidence to show that Velammal had executed the will in a sound and disposing state of mind.

16. In the result, the appeal is dismissed, but, considering the peculiar circumstances and the relationship of parties, we make no order as to costs in this appeal. The appellant will pay the Court-fee due to Government.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Veeraswami, CJ. and Suryamurthy, J.*

The Joint Commercial Tax Officer, Central Intelligence Wing, Board of Revenue (C.T.), Madras ... *Petitioner**

v.

Purushotham Rungta ... *Respondent.*

Tamil Nadu General Sales Tax Ac (I of 1959), *section* 41 (3)—*Constitution of India* (1950), *Articles* 19, 31—*Seizure of documents by Joint Commercial Tax Officer—Seizure illegal—Use of the documents in revenue proceedings legal.*

No distinction can be drawn from an order passed on illegally seized documents not being rendered void and permissibility of the user of such documents before such an order is made and in the process of making it. User and its legality are entirely governed by the provisions of the Evidence Act and from a certain angle also, in some cases, on the power of the Court or the authority concerned to summon documents from a party or a third party for the purpose of making use of them. There is nothing in the Evidence Act which inhibits user of illegally seized documents; nor is the power of the Court or the authority under the law to summon and make use of the documents restricted to documents which have been seized lawfully.

[*Para.* 3]

It is true that the fundamental right of a citizen to property includes also illegally seized documents and their copies and no property can be seized except under the authority of law. But neither of these rights seems to impinge upon the basic rights under Article 19 and also Article 31 of the Constitution of India.

[*Para.* 4.]

Cases referred to:—

Annamalai Chettiar and Company v. *Deputy Commercial Tax Officer*, (1965) 16 S.T.C.

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*W.M.P. Nos. 7731 of 1975 in W.P. 2273 of 1972.
10*th Februrary*, 1976.

687; *Karuma* v. *Queen*, (1955) A.C. 197; *R.S Jhaver* v. *Commissioner of Commercial Taxes*, (1965) 16 S.T.C. 708; *Pooranmal* v. *Director of Inspection*, 93 I.T.R. 505: (1974) Tax L.R. 340: (1974) 1 S.C.C. 345: (1974) 1 I.T.J. 406: (1974) 1 S.C.J. 641: A.I.R. 1974 S.C. 348; *Balwant Singh* v. *Director of Inspection*, (1969) 71 I.T.R. 550: (1969) 1 I.T.J. 625: A.I.R. 1969 Delhi 91; *Wazir Chand* v. *State of M.P.*, 1954 S.C.J. 600: (1955) 1 S.C.R. 408: A.I.R. 1954 S.C. 415; *Commissioner of Commercial Taxes* v. *Ramkishan Shrikishan Jhaver*, (1967) 20 S.T.C. 453: A.I.R. 1968 S.C. 59; *Hari Kisandas Gulabdas and Sons* v. *State of Mysore*, (1971) 27 S.T.C. 434.

Petition praying that in the circumstances stated therein the High Court will be pleased to direct the Head Accountant in the office of the Registrar, High Court, Madras, to hand over the certified photostat copies of documents deposited in the office, as per directions of Court in W.M.P. No. 2946 of 1973 to enable the petitioner to make use of the same in connection with the assessment relating to Andhra Steel Corporation (Pvt.) Ltd., etc.

The Additional Government Pleader, No. 1, for Petitioner.

A. K. Venugopal, for *D. Mohanchand Gupta*, for Respondent.

The order of the Court was made by

Veeraswami, CJ.—This petition involves the question as to whether, where documents have been illegally seized and the Court has ordered them to be returned, but it has allowed photostat copies of the documents to be retained in Court in a sealed cover pending further direction, their user by the department can be permitted. On 11th July, 1972, on the strength of a search warrant issued by the Chief Presidency Magistrate in R.O.C. No. 4794 of 1972, the residence bearing door No. 24, Nannian Street, Park Town, Madras-3, was searched and certain documents were seized. The application made by one Thiru Dankel, Joint Commercial Tax Officer, Central Intelligence Wing, Board of Revenue, Madras, for the issue of warrant stated:

> "I have received information that Thiru Andhra Steel Corporation, No. 304, Thambu Chetti Street, Madras-1, has kept his secret account books, etc., in his residence at No. 24, Nannian Street, Park Town, Madras 3, relating to his business and as they are required in connection with an enquiry aganist him under the General Sales Tax Act, 1959, may be issued with a warrant to search and to recover the books from the place mentioned under section 98, Criminal Procedure Code, read with section 41 of the Madras General Saler Tax Act, 1959."

A warrant was issued adopting that language. It may be mentioned that the Andhra Steel Corporation has its registered head office at Calcutta, and has a branch at No. 304, Thambu Chetti Street, Madras-1. The petitioner in W.P. No. 2273 of 1972, is one Purushothamlal Rungta, whose premises are No. 24, Nannian Street, Park Town, Madras-3, and he had nothing to do with the Andhra Steel Corporation, though it appears, his younger brother one Sajjan Kumar Rungta was the Manager of that Corporation, a company registered under the Companies Act. Purushothamlal Rungta applied in W.P. No. 2273 of 1972 for a writ of *mandamus* directing return of the documents to him on the ground that the seizure thereof was illegal. This matter was heard by a Division Bench, to which one of us was a party. After arguments, the then first Assistant Government Pleader undertook that the documents would be returned in six weeks. On that basis an order to that effect was made by this Court. This order was dated 15th February, 1973. This order was modified on 28th March, 1973 and as modified, it read:

> "With reference to our earlier order dated 15th February, 1973, the learned Advocate-General, who appears for the Revenue, states that, even if the originals are handed to the petitioner, certified copies thereof, after comparing with the originals, should be retained in this Court in a sealed cover subject to further directions of this Court. We accordingly direct that the original order dated 15th February, 1973, should be complied with except that

certified copies of the original relating to M/s. Andhra Steel Corporation Ltd., will be kept in the custody of Court in a sealed cover or bundle awaiting further directions from this Court."

The present application is for a direction to enable the revenue to make use of the copies and then return them to Purushothamlal Rungta.

2. Mr. Venugopal, who appears for Purushothamlal Rungta, objects to any such directions being given on three grounds—firstly, the company has no residence in Madras as comprehended by the provisions of the Criminal Procedure Code and the branch office of the company at Madras can in no sense be regarded as the residence of the company. Actually the search was not even in the branch office, but at the residence of Purushothamlal Rungta, who had nothing to do with the Corporation. The fact that the Chief Presidency Magistrate did not apply his mind while issuing the warrant to these aspects rendered the search and seizure of the documents illegal Secondly, the seizure of the documents was not accompanied by a mahazar attested by witnesses as required by the provisions of section 103, Criminal Procedure Code. Thirdly, in any case, the documents were retained by the revenue beyond 30 days in violation of section 41 (3) of the Madras General Sales Tax Act, 1959.

3. But we find that there is no controversy before us on the question that the seizure of the documents was illegal. It is not also in controversy that since the seizure was illegal, the documents are bound to be returned to Purushothamlal Rungta. As a matter of fact, this Court has ordered the originals to be returned, which has been carried out. That being the case, the grounds as raised by Mr. Venugopal for Rungta do not arise for consideration. But the precise question we are called upon to decide is as to the permissibility of the user, for the purpose of assessment, of the photostat copies of the originals seized illegally. We have a line of cases in this Court consistently taking the view that though the illegally seized documents have been made use of in a revenue assessment, the order of assessment on that ground will not be rendered illegal or void, because admissibility of such documents does not depend upon the source or the manner in which they are obtained, but on relevancy and their admissibility. One of the earliest cases holding that view is *Annamalai Chettiar and Co.* v. *Dy. Commercial Tax Officer*,[1] decided by one of us. The view was rested on the ratio of *Karuma* v. *Queen*[2]. But Mr. Venugopal's contention is that if, before the revenue makes use of the copies in making the assessment, his client is vigilant enough to come to this Court and ask for forbidding of such user, the revenue cannot resist issuing such direction. In our opinion, in principle, no distinction, if the substance of the matter is borne in mind, can be drawn from an order passed on illegally seized documents not being rendered void and permissibility of the user of such documents before such an order is made and in the process of making it. We see no differences between the two, because user and its legality are entirely governed by the provisions of the Evidence Act and from a certain angle also, in some cases, on the power of the Court or the authority concerned to summon documents from a party or a third party for purposes of making use of them. There is nothing in the Evidence Act which inhibits user of illegally seized documents; nor the power of the Court or the authority under the law to summon and make use of the documents is restricted to documents which have been seized lawfully.

4. It is true that the fundamental right of a citizen to property includes also illegally seized documents and their copies and that no property can be seized except under the authority of law. But neither of these rights really seems to impinge upon the basic rights under Article 19 and also Article 31 of the Constitution of India. The Fourth and Fourteenth Amendments to the American Constitution have been looked upon or interpreted by the American Courts in a slightly different way, but not always consistently. In any case, as we have already indicated, the same principle which holds valid an order which has

1. (1965) 16 S.T.C. 687.
2. (1955) A.C. 197.

used illegally seized documents informs the permissibility of the user of such documents in the process of making an assessment order. That principle is inherent in *Karuma* v. *Queen*[1] and also *R.S. Jhaver* v. *Commissioner of Commercial Taxes*[2] and all the subsequent cases, which followed that principle. In fact, it seems to us that the question is concluded by *Pooranmal* v. *Director of Inspection*[3]. That was a case of an illegal seizure in connection with income-tax procedings. Among others, one of the questions that was decided there has a direct bearing to the instant case before us. The Supreme Court, dealing with that question, held in that case:

> "However, there was another relief claimed in the petitions and that was for a writ of prohibition restraining the income-tax department from using as evidence any information gathered from the search of the articles seized. It would appear from the record that the High Court was prepared to assume for the purposes of those cases that the search and seizure was illegal. Even so, the question remained whether these victims of illegal search were entitled to a writ of prohibtion that the income-tax authorities shall not use any information gathered from the documents which had been seized. The High Court held that they were not, and proceeded to pass the following identical order in the two cases. It is as follows:
>
> 'In this case all the decuments seized in pursuance of the search warrant have been returned to the petitioners and the only question is whether the information gathered as a result of such search and seizure could be used in evidence if it be held that the search and seizure was illegal. In *Balwant Singh* v. *Director of Inspection*[4] announced today, we have held that such information can be used. It is unnecessary, therefore, to pronounce upon the validity of the search and seizure. This petition, therefore, fails and is dismissed with no order as to costs'.
>
> *Balwant's case*, referred to above is reported in 71 I.T.R. 550. We understand that an appeal had been filed to this Court but was not prosecuted. That decission not only upheld the constitutionality of section 132 of the Income-tax Act, but also held that there was nothing in Article 19 of the Constitution which forbids the use of evidence obtained as a result of an illegal search. Consistently with that view the relief for a writ of prohibition was rejected and hence the two civil appeals before us."

Then the Court went on to further deal with this matter and then observed:

> "It, therefore, follows, that neither by invoking the spirit of our Constitution nor by a strained construction of any of the fundamental rights can we spell out the exclusion of evidence obtained on an illegal search."

The Court expressed its conclusion in this matter :

> "In that view, even assuming, as was done by the High Court, that the search and seizure were in contravention of the provisions of section 132 Income-tax Act, still the material seized was liable to be used, subject to law before the income-tax authorities against the person from whose custody it was seized, and, therefore, no writ of prohibition in restraint of such use could be granted. It must be, therefore, held that the High Ccurt was right in dismissing the two writ petitions. The appeals must also fail and are dismissed with costs."

5. It is clear from this decision that where the party from whom the documents were illegally seized sought for a prohibition against the department from making use of the information taken out from those documents, the prohibition was refused, the ground being that the department had in any case, the power to summon evidence and make use of it

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1. (1955) A.C. 197.
2. (1965) 16 S.T.C. 708.
3. 93 I.T.R. 505: (1974) Tax L.R. 340: (1974) 1 S.C.C. 345: (1974) 1 I T.J. 406: (1974) 1 S.C.J. 641: A.I.R. 1974 S.C. 348.
4. (1969) 71 I.T.R. 550: (1969) 1 I.T.J. 625: A.I.R. 1969 Delhi 91.

and that there is nothing in the Constitution or in the Evidence Act to inhibit user of such evidence in income-tax proceedings. We can see no sensible distinction between information taken from documents and copies thereof as to their user in revenue assessment proceedings.

6. Our attention was invited to *Wazir Chand* v. *State of M.P.*[1] and *Commisiooner of Commercial Taxes* v. *Ramkishan Shrikishan Jhaver*[2], both decided by the Supreme Court. But neither of them actually had to do with the present question we are deciding in this case. The question of the propriety of user of illegally seized documents was not mooted and decided in those cases. No doubt, *Harikisandas Gulabdas and Sons* v. *State of Mysore*[3] a decision of the Mysore High Court, expressed a contrary view. But in making that view, *R.S. Jhaver* v. *Commissioner of Commercial Taxes*[4] and *Commisicner of Commercial Taxes* v. *Ramkishana Srikishan Jhaver*[2], appear to have been relied on. So far as *Jhaver's case*[4] was concerned, the present question was not decided. The prayer in that case was for a simple direction to return the documents illegally seized. The Court was not called upon to decide whether, before returning those documents, the Court can permit the user of such documents in revenue proceedings.

7. We accordingly direct that the revenue will make use of the photostat copies or other copies which are in the sealed cover in this Court which the Registrar will make available to them and the revenue will return the photostat copies within twelve weeks from to date.

S.J. ——— *Petition allowed.*

1. 1954 S.C.J. 600: (1955) 1 S.C.R. 408: A.I.R. 1954 S.C. 415.
2. (1967) 20 S.T.C. 453: (1967) 2 I.T.J. 919: (1968) 1 M.L.J. (S.C.) 43: (1968) 1 S.C.J. 121: (1968) 1 An. W.R. (S.C.) 43: (1968) 1 S.C.R. 148: A.I.R. 1968 S.C. 59.
3. (1971) 27 S.T.C. 434.
4. (1965) 16 S.T.C. 708.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P.S. Kailasam, Officiating CJ. and Balasubramanyan, J.*

The Shipping Corporation of India Ltd., carrying on business at Steel Grete House, Bombay

... *Appellants**

v

The Metal Box Co., of India Ltd., by its Principal Officer S. Devarajan, Madras and another .. *Respondents.*

Indian Carriage of Goods by Sea Act (XXVI of 1925), Schedule, Article 4, sub-section (2) (c)—Suit for damages—Goods imported by ship—Damage caused to goods while in transit —Plea of damage being due to peril of the sea upheld.

The 1st plaintiff imported a certain quantity of tin plates from Japan. The goods were transhipped by the Shipping Corporation of India and the goods were insured by the 1st plaintiff. When the ship arrived at the destination the tin plates were found damaged and the insurer accepted the fact. A suit was filed by the 1st plaintiff along with 2nd plaintiff for recovery of damages alleging that sea water had entered into the ship on account of the ship-owner's negligence. The Shipping Corporation raised the defence that the damage caused was due to perils of the sea and that they were not liable. There was a clearance certificate to the effect that the ship was sea worthy. The log-book of the vessel showed that on 14th, 15th and 17th December, 1966, the vessel was rolling and that there was pounding and straining due to rough sea and swell and that there was continuous drizzle.

Held, differing from the trial Court that it was not possible to hold that water would have entered the hatch as a result of the hatch not having been properly closed, inasmuch as there was hardly any evidence to that effect.

[*Para.* 1.]

*O.S.A. No. 57 of 1972. 17*th March*, 1976

The correct test is that formulated by the Privy Council *Canada Rice Mills Ltd.* v. *Union Marine & General Insurance Co.*, in 1941 A.C. 55, namely, that where there is an accidental incursion of sea water in a part of the vessel and in a manner, where sea water is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured, there is *prima facie* a loss by perils of the sea. [*Para.* 3.]

Damages need not be due to extraordinary violence of the wind or waves but may be caused by heavy weather and rough sea and swell, as in the instant case.

[*Para.* 4.]

Held further:—The rights of parties were governed by Article 4, sub-section 2 (*c*) of the Schedule to the Indian Carriage of Goods by Sea Act, 1925.

[*Paras.* 5 *and* 6.]

Cases referred to:—

Canada Rice Mills Ltd. v. *Union Marine & General Insurance Co.*, (1941) A.C. 55; *Wilson Sons & Co.*, v. *Owners of Cargo Bar the Xantho*, 12 A.C. 503; *Hamilton Fraser & Co.* v. *Pandorf & Co.*, 12 A.C. 518; *Thames and Mersey Marine Insurance Co.* v. *Hamilton Fraser & Co.*, 14 A.C. 484; *Mountain* v. *Whittle*, (1921) 1 A.C. 615; *Meter & Co. Ltd.*, v. *Licences & General Insurance Co.*, (1944) 1 All E.R. 341; *Catharine Chalmer's Case*, 32 L.T.R. 846.

Appeal against the order of N. S. Ramaswami, J., in C.S. No. 3 of 1968, Original Side, High Court, Madras.

S. Sampathkumar and *S. Rangarajan*, for Appellants.

A. Ramanathan and *B. T. Seshadri*, for Respondents.

The Judgment of the Court was delivered by

Kailasam, O.CJ.— This appeal is preferred by the defendant in C.S. No. 3 of 1968, the Shipping Corporation of India Ltd., against the judgment and decree of N.S. Ramaswami, J. That was a suit filed by the Metal Box Co. of India Ltd., for payment of a sum of Rs. 1,23,769 with interest. The plaintiff imported a certain quantity of tin plates from Japan. The goods imported had been insured with the New Zealand Insurance Co. Ltd., which is the second plaintiff in the suit. When the ship arrived at the Madras Port on 30th December, 1966 it was found that the consignment of the plates was wet. A survey was made and it was found that quite a number of tin plates were damaged. After the surveyor's report, the first plaintiff made claim for damages to the extent of Rs. 1,23,769. The insurer the second plaintiff, accepted the claim of the first plaintiff and paid the said amount. The suit for recovery of the said amount is based on the ground that the damage to the goods being while the goods were carried by the ship, it was due to the fact that the defendant had not taken proper and sufficient care of the goods. The defence to the suit is that the damage was due to perils, dangers and accidents of the sea or act of God. According to the defendant sea water had entered the particular hatch in which the cargo had been loaded and such entry of sea water was possibly through storm valve cover. The learned Judge framed seven issues, the important one being issue No. 2, which is as follows :

> "Was the damage due to peril of the sea, and if so, is the defendant liable for the same"?

The learned Judge has referred to the evidence of P.W. 2. who deposed to the effect that the fracture of the overboard discharge valve cover on scupper would not normally occur and that would happen only under very exceptional circumstances by force of the sea, and was of opinion that it is not of much help. The learned Judge did not place much reliance on the clearance certificate granted to the vessel at the port from which it last sailed stating that the vessel was sea-worthy. The learned Judge observed thet D.W. 2 in cross-examination conceded that the Mercantile Marine Department issues the clearance certificate merely on the basis of the records communicated by the Master of the ship and without the departmental people making an inspection of the ship before issuing the clearance certificate. At this stage, we may say that we are unable to reject the clearance certificate

and agree with the learned Judge that the vessel was not sea-worthy. We would take into account the evidence of D.W. 2 that the fracture of the overboard discharge valve cover on the scupper would not normally occur and that could happen only under very exceptional circumstances by forceof the sea. Apart from the evidence of D Ws. 1 and 2, the learned Judge referred to the log-book of the vessel Exhibit D-7. Against the dates 14th December, 1966, 15th December, 1966 and 17th December, 1966, the log-book entries show that the vessel was rolling and pitching moderately and sometimes heavily, that there was pounding and straining due to rough sea and swell and that hold vents were being attended to, but such an attention was restricted due to continuous drizzle, etc. On arrival of the ship at Madras Port, the Chief Officer of the vessel informed the Captain that sea water was leaking into the tunnel recess from the flange of scupper pipe located between frames Nos. 12 and 13 of the stud. The report of the surveyor that sea water had found access during the voyage between Wakamatau and Madras *via* Singapore is accepted by all parties concerned. In Exhibit P-19, the survey report, it is stated that the cause for the damage was contact with salt water. The surveyor recommended that storm valve situated between Nos. 18 and 19 through which it was feared that sea water might have found an entry in No. 5 L hold should be fitted with new cover and stud in place of the cover which was cracked and the stud which was broken and valve should be blanked till permanent repairs can be carried out in Bombay at which place the lower hold will be free of cargo. The learned Judge, on the entries found in the log-book, came to the conclusion that it is fairly clear that there was difficulty in respect of the overboard discharge valve in hatch No. 5 and that it was possible that sea water had entered through its valve cover. But, according to the learned Judge, it is not possible to hold from the evidence on record that water should have entered the hatch only through the abovesaid valve and by no other means. As the defendant has not chosen to place any reliance regarding the examination of the vessel at Bombay fort at a later point of time, the learned Judge drew an adverse inference against the shipping company. The learned Judge proceeded to observe that there was nothing to show that water could not have entered the hatch as a result of the hatch not having been properly closed, as there was no entry anywhere that the hatch was found properly closed, before it was opened. Here, again, we are unable to accept the view of the learned Judge that water would have entered the hatch as a result of the hatch not having been properly closed, for, there is hardly any evidence to that effect.

8. Regarding the question of law, the learned Judge proceeded to state as follows:

> "Assuming that the entire damage to the goods was only due to sea water entering the hatch, as a result of one stud holding storm valve cover was broken and storm valve cover being cracked and storm valve flap was in closed position, as claimed in the written statement, still the question is whether it is due to perils of the sea or act of God, as contended by the defendant."

The learned Judge found that there was no proper pleading to the effect that there was heavy water or rough sea during voyage resulting in the damage. The learned Judge may not be correct in, his reading of the pleadings. In the written statement in paragraph 14, it is stated that during the voyage in question the vessel had experienced heavy weather and rain, in respect of which protest was noted by the Master at Madras. The position of law, according to the learned Judge, is that it is necessary for the defendant to prove that the damage was due to act of God or it must have occurred independently of human action and man must have been purely passsive and it must have been an event which the ship owner could not have avoided or guarded against by any means which he could reasonably be expected to use. The learned Judge was of the view that heavy weather or rough sea is nothing abnormal in a sea voyage and they are normal incidents of such voyage and that, in the

circumstances, the damage to the goods was not due to perils of the sea or act of God as claimed by the defendant.

3. We find ourselves unable to accept the view taken by the learned Judge on the question of law. The position is stated by Scrutton in his book 'Charter Parties and Bills of Lading' at page 224, Article 84, under the heading 'Perils of the Sea' thus:

> "Any damage to the goods carried caused by sea water, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the ship owner or his servants as necessary or probable incidents of the adventure."

This view has been subsequently modified and the requirement of unforeseen happenings is not insisted upon. The leading case on the point in *Canada Rice Mills Ltd.* v. *Union Marine and General Insurance Co*[1]. The Privy Council in that case had to consider the purport of the words 'Perils of the sea.' In that case, a ship was carrying a cargo of rice. On arrival at the port of discharge, it was found that the rice had heated, and on a claim by the appellants in that case under the policy to recover the loss sustained, the special jury found that the rice was damaged by heat caused by the closing of the cowl ventilators and hatches from time to time during the voyage. It was also found that such closing was the proximate cause of the damage and that the weather and sea during the time the ventilation was closed were such as to constitute a peril of the sea. At page 67, the Privy Council referred to the view of the reasoning of Sloan, J.A., who was of the view that there was no peril of the sea, because, in his opinion the weather encountered was normal, and such as to be normally expected on a voyage of that character, and that there was no weather bad enough to endanger the safety of the ship if the ventilators had not been closed The Privy Council holding that these were not the true tests, observed that where there is an accidental incursion of sea water into a vessel at a part of the vessel, and in a manner, where sea water is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured. there is *prima facie* a loss by perils of the sea. In coming to that conclusion, the Privy Council referred to the decision in *Wilson Sons and Co.* v. *Owners of Cargo Parthe Xantho*[1] *Hamilton Fraser and Co.* v. *Pandorf and Co.*[2] and *Thames and Mersey Marine Insurance Co.* v. *Hamilton Fraser and Co.*[3]. The decision in *Wilson Sons and Co.* v. *Owners of Cargo Parthe Xantho*[1] was cited with approvalas authority for the meaning of the words 'perils of the sea' and the Privy Council extracted the following passage at page 68 of the report:

> "The purpose of the policy is to secure an indemnity against incidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the wind or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding".

In *Hamilton Fraser and Co.* v. *Pandorf and Co.*[2] where a rat had gnawed a hole in a pipe, whereby sea water entered and damaged the cargo, there was no suggestion that the ship was endangered, but the damage to the cargo of rice was held to be due to a peril of the sea. There are many contingencies which might let the water into the ship besides a storm, and, in the opinion of Lord Halsbury in the case cited above, any accident that should do damage by letting in sea-water into the vessel should be one of the risks contemplated. It is clear, therefore, that it is not necessary that damage should be occasioned by extraordinary violence of the wind or waves, and it is enough if there is an accidental incursion of sea water into the vessel in a manner where sea water is not expected to enter in the ordinary course of things and there is consequent damage to the thing insured.

1. (1941) A.C. 55.

1. 12 A.C. 503.
2. 12 A.C. 518, 527.
3. 14 A.C. 484, 502.

In *Mountain* v. *Whittle*[1], which is referred to by the Privy Council, a house boat, the seams of which above the water line had become defective, was towed in fine weather and in closed water in order to be repaired. A powerful tug was employed, and this caused a bow wave so high as to force water up into the defective seams. There was no warranty of sea-worthiness. According to Lord Sumner, sinking by such a wave seems to be a fortuitous casualty; whether formed by passing steamers or between tug and tow, it was beyond the ordinary action of wind and wave, or the ordinary incidents of such to waves. In summing up, the Privy Council stated that it could not be predicated that where damage was caused by a storm, even though its incidence or force was not exceptional, a finding of loss by perils of the sea may not be justified.

4. The law therefore, is very clear that the loss need not be due to extraordinary violence of the wind or waves, and in this case, there was heavy weather and rough sea, and the vessel was rolling and pitching moderately, and sometimes heavily and there was pounding and straining due to rough sea and swell, as evident from the entries in the log-book, Exhibit D-7. Hence, the decision in *Canada Rice Mills Ltd.* v. *Union Marine and General Insurance Co.*[2] would apply to the facts of the present case.

5. This decision was followed in *Meter and Co., Ltd.* v. *Licences and General Insurance Co. Ltd.*[3]. In the later case, a consignment of china clay on its voyage from Liverpool to Bombay, *viz.*, the Cape of Good Hope was found damaged due to contact with other cargo in the vessel. The log entries, while the vessel was rounding the Cape, showed that she encountered 'strong wind', 'rough seas' and 'swell' and the vessel was described, at different times, as 'plunging,' 'pitching heavily' and 'labouring and straining heavily.' It was, however, common ground that this weather was such as was normally to be expected on a voyage

1. (1921) 1 A.C. 615.
2. (1941) A.C. 55.
3. (1944) 1 A.E.R. 341.

round the Cape at the material time. Upon this it was argued that there was nothing abnormal or unexpected in the weather experienced on such a voyage, that there was nothing fortuitous in what occurred, and that the damage was solely due to the ordinary action of wind and waves and there was no peril of the seas. Repelling this contention and referring to the three cases of the House of Lords reported in 12 Appeal cases, and the later decision of the Privy Council in *Canada Rice Mills* v. *Union Marine and General Insurance Co.*[1] Tucker, J., as he then was observed thus:

> "I think it is clearly erroneous to say that because the weather was such as might reasonably be anticipated, there can be no peril of the sea. There must, of course, be some element of the fortuitous or unexpected to be found somewhere in the facts and circumstances causing the loss, and I think such an element exists when you find that properly stowed casks, in good condition when loaded, have become stowed in as a result of the straining and labouring of a ship in heavy weather".

Tucker, J., also relied on an early case, the *Catherine Chalmers case*[2] decided in 1894, observing that its correctness on this point had never been questioned. In the earlier case, the evidence before the Court was that during the voyage the vessel in question met with 'bad weather' and although not badly damaged, the ship 'strained' very heavily. On this evidence it was argued that there were no 'extraordinary,' perils affecting the ship and cargo. It was further urged that 'straining' was an ordinary peril which every ship must undergo and which is contemplated by a ship-owner as one of the contingencies of every voyage, and it is a contingency against which the ship-owner was bound to provide. Rejecting this contention and finding that the damage was caused by the peril of the sea the Court observed:

> "I am unable to draw a distinction forced upon me between ordinary and

1. (1941) A.C. 55.
2. 32 L.T.R. 846

extraordinary perils. In truth it may be said that the way in which the cargo was stored was more or less a cause of the damage; but I am of opinion that the evidence shows that the cargo was towed in the ordinary way, and if the bad weather had not occurred, and the straining had not taken place, the cargo would I think, have arrived without damage, and consequently, the proximate cause of the damage must be taken to have been the perils of the sea".

In the present case, the rights of parties are governed by Article 4, sub-section 2 (*c*) of the Schedule to the Indian Carriage of Goods by Sea Act, 1925. The Article runs as follows:

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(*a*).. ...(*b*) ......(*c*) perils, dangers, and accidents of the sea or other navigable waters."

6. Thus, the words are wide enough, if not broader than the words which the Privy Council was construing in *Canada Rice Mills Ltd.* v. *Union Marine and General Insurance Co.*[1] We, therefore, find that the view of the learned Judge is erroneous. We allow the appeal and dismiss the suit with costs. In this view, it is unnecessary to go into the quantum of damages.

S.J. ——— *Appeal allowed.*

1. (1941) A.C. 55.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

Subbammal *alias* **Rajammal and others** ... *Petitioners**

v.

The President, The Tenkasi Co-operative Urban Bank Ltd., Tenkasi (in Liquidation) through its Special Officer, having its Office at Kokirakulam, Tirunelveli .. *Respondent.*

Tamil Nadu Co-operative Societies Act (LIII of 1961), section 71—Co-operative Bank—Misappropriation by clerk—Enquiry—Supersession of the bank—Surcharge notice against ex-President and ex-Vice-President—No wilful negligence on their part—Mere negligence not sufficient to fasten liability.

A clerk of a Co-operative Bank misappropriated the funds of the bank by adopting various methods. They could not be found out easily. There was a secretary supervising the work of the clerk. The President and Vice-President were merely affixing their signatures to the various statements. The misappropriation was carried on by the clerk from 1948 up to 1965. The accounts were subject to departmental audit annually and the misappropriation was not detected. A special enquiry was ordered under section 65 of the Co-operative Societies Act and the misappropriation was found out. The bank was superseded and a surcharge notice was issued against the ex-President and ex-Vice-President and others. Pending proceedings, the ex-President and ex-Vice-President died. Their legal representatives challenged the surcharge notices before the Co-operative Tribunal, but without success. The legal representatives filed revision and writ petitions against the order of the Tribunal on the ground that the ex-President and ex-Vice President were not wilfully negligent and that they were not liable under section 71.

Held: Section 71 of the Tamil Nadu Co-operative Societies Act, 1961, authorises a surcharge order being passed against

* C.R.P. No. 696 of 1972 and W.P. No. 1178 of 1972.

30th April, 1976.

persons in management of the society, *inter alia* on the ground that they had been "wilfully negligent". "Wilful negligence" in section 71 is for the purpose of holding a person in management liable if he has caused loss to the society by his intentional and purposeful omission. Mere negligence, however gross it may be, may not be sufficient to attract the section. [*Paras.* 7 *and* 10.]

"Wilful negligence" in section 71 is a new and separate head of liability, and it is not possible to bring the same under the head "breach of trust". [*Para.* 13.]

Even if normal care had been taken by them before signing the accounts that would not have brought to light the various acts of misappropriation made by the clerk, for each entry in the account book was supported by a voucher even though forged and false. It was not in dispute in this case that there was a secretary functioning in the bank and it was his duty to supervise the work of the clerk and it was a case of negligence, if at all, on the part of the secretary to properly supervise the work of the clerk. On the facts of this case, the failure to check the accounts or to detect the misappropriations made by the clerk could not be said to be due to wilful negligence of the ex-President and ex-Vice-President. No wilful negligence had been established on their part and they could not be made liable. [*Paras.* 11 *and* 12.]

Cases referred to:—

R. v. *Downes*, (1875) 1 Q.B.D. 25; *Reg.* v. *Senior*, (1899) 1 Q.B. 283; *Cooper* v. *Cooper*, 65 C.L.R. 162; *Ardeshir Bhicaji Tamboli* v. *The Agent, G.I.P. Rly. Co.*, (1928) 54 M.L.J. 167: 27 L.W. 667: 55 I.A. 67: A.I.R. 1928 P.C. 24; *R.C.N. Kulkarni* v. *State*, (1954) A.L.J. 822; *National Bank of Wales*, In re, (1899) 2 Ch. 620; *Davey* v. *Cory*, (1901) A.C. 477; *Sundaram* v. *Dy. Registrar of Co-operative Societies*, (1956) 2 M.L.J. 613: I.L.R. (1957) Mad. 371: 69 L.W. 917: A.I.R. 1957 Mad. 634; *Kuppuswami* v. *Dy. Registrar of Co-operative Societies*, (1967) 2 M.L.J. 79: 80 L.W. 445.

Petition under Article 227 of the Constitution of India praying the High Court to revise the order of the Co-operative Tribunal (District Court), Tirunelveli, dated 13th December, 1971 and made in C.M.A. No. 67 of 1967 (Surcharge claim No. 29660 of 1966), Deputy Registrar of Co-operative Societies, Tirunelveli.

S.S. Marthandan and *R. Sundaralingam*, for Petitioners.

V. Rama Jagadisan for *E. Padmanabhan*, and *T. Sathiadev*, Assistant Government Pleader, for Respondents.

The Court made the following

ORDER:—As both the above cases arise out of the same proceedings and involve identical issues, they are dealt with together.

2. An enquiry into the constitution, working and financing condition of the Tenkasi Co-operative Urban Bank Limited, hereinafter referred to as the bank, was ordered under section 65 of the Madras Co-operative Societies Act, 1961. by the Deputy Registrar, Tirunelveli in his proceedings, dated 22nd November, 1965. A preliminary report of the enquiry officer was submitted on 19th July, 1966 and it showed that there had been misappropriation of the bank's funds. As a follow-up of the said report the Deputy Registrar issued surcharge notices, dated 6th August, 1966, under section 71 of the Act to one M. Chockalingam Pillai the ex-President, and N.T. Pannayar, the ex-Vice-President, and 8 others who were ex-directors of the bank. A surcharge notice was also issued to one R. Ulaganathan, ex-clerk of the bank who was alleged to have misappropriated the funds of the bank. At that stage the bank was superseded and a Special Officer was appointed under section 72 of the Act by an order of the Joint Registrar, dated 10th September, 1966 In answer to the above surcharge notices issued to them, the ex-directors represented that the enquiry officer had sent only a preliminary report, and that surcharge proceedings could be initiated only after a complete and full report of the enquiry is received. In view of this objection, a revised surcharge notice was issued on 12th December, 1966, after

receipt of a complete and full report of enquiry on 29th October, 1965, in modification of the earlier surcharge notice, dated 6th August, 1966. In the surcharge proceedings following the said revised notice, dated 12th December, 1966, it was found that an amount of Rs. 27,519-13 has been misappropriated during the period from 15th January, 1948 to 23rd August, 1966, out of which a sum of Rs. 1,000 was made good by the said Ulaganathan, ex-clerk. However, in view of section 71 (1) which bars recovery of any amount by way of surcharge after a period of six years from the date of any act or omission, the amount misappropriated within six years prior to the notice of surcharge was alone taken into account. The result was the second surcharge notice related only to a sum of Rs. 12,718 referable to the period covering six years preceding the surcharge notice. By his final order dated 19th August, 1967 a surcharge order has been passed against the ex-clerk as well as the ex-President, ex-Vice-President and the ex-directors holding them jointly, and severally liable for the said sum of Rs. 12,718 found to have been misappropriated from the bank's funds.

3. Chockalingam Pillai, the ex-President of the Bank and N. T. Pannayar, the ex-Vice-President of the bank, having died pending the surcharge proceedings, their legal representatives filed appeals before the Co-operative Tribunal, Tirunelveli (District Judge, Tirunelveli). The said appeals have been dismissed on 13th December, 1971. The legal representatives of Chockalingam Pillai, ex-President of the bank have challenged the said decision of the Co-operative Tribunal in the civil revision petition. The legal representatives of the ex-Vice-President, N. T. Pannayar has filed the writ petition questioning the order of the Co-operative Tribunal.

4. The findings of the enquiry officer on the basis of which the surcharge order has been passed against the ex-clerk and ex-directors is that the entire amount covering items 25 to 40, had been misappropriated by the ex-clerk, that he had also been convicted in a criminal Court for misappropriation of the bank's funds, and that the President and Vice-President and ex-Directors are liable to be surcharged for their carelessness and negligence. The Co-operative Tribunal refers to the evidence of Ulaganathan, ex-clerk who had deposed that he was the only clerk of the bank from 6th June, 1939 to 17th December, 1965, that he was in sole charge of the accounts relating to the surcharged items 26 to 40, that the amounts involved in items 25 to 40 were in fact misappropriated by him and the former Presidents, Somasundaram Pillai and Chockalingam Pillai and the ex-Vice President N. T. Pannayar, that he took only a sum of Rs. 7,000 for his family expenses and that the balance was taken by the Presidents and Vice-Presidents. As against this, Chockalingam Pillai and N. T. Pannayar, had denied that they had anything to do with the amount covered by the surcharged items 25 to 40 and had stated that the entire amount had been misappropriated by the clerk, that they had complete faith in the secretary and the clerk Ulaganathan, that the secretary is expected to exercise control over the work of the clerk and that, therefore, they were not in a position to detect the various defalcations made by the clerk till the enquiry initiated under section 65 revealed the various methods through which he has misappropriated the bank's funds. After going through the evidence and the connected records the Tribunal has specifically found that the entire amount involved has been misappropriated by the ex-clerk, that the ex-President, ex Vice-President and ex-secretary and ex-Directors on account of their negligence have failed to exercise proper control over the clerk Ulaganathan by checking the cash books and the statement of receipts and disbursements submitted by the clerk at the Board meetings periodically and that, therefore, all of them should be held responsible for the amounts misappropriated by the clerk. Thus ex-Presidents, ex-Vice-President and ex-Directors have been held liable for the surcharge on the ground that they were guilty of negligence in the performance of their duties, particularly their failure to check effectively and properly the cash books daily and the statement of receipts and disbursements submitted by the clerk periodically in the Board meetings for their scrutiny and approval.

5. The learned counsel for the petitioners, on the facts found by the Co-operative Tribunal, contends as follows: The surcharged order so far as it is against the ex-President and ex-Vice-President cannot be sustained under section 71 of the Act Under section 71 a surcharged order could be passed against a person who is entrusted with the organisation and management of the society or an officer or servant of the society if he has (1) misappropriated or fraudulently retained any money or other property of the society, or (2) has been guilty of breach of trust in relation to the society, or (3) has caused any deficiency in the assets of the society by breach of trust or wilful negligence, or (4) has made any payment contrary to the Act, rules, bye-laws, etc. That Tribunal having found that the ex-President, ex-Vice-President and the ex-Directors have not misappropriated or fraudulently retained the monies belonging to the bank or been guilty of any breach of trust, the only ground of liability for surcharging them is wilful negligence and, therefore, unless wilful negligence is proved they cannot be held liable for the surcharge.

6. There can be no dispute that section 71 authorises the surcharge order being passed against persons in management of the society (1) if they had misappropriated or fraudulently retained the funds of the society, (2) if they are guilty of breach of trust in relation to the society, or (3) if they had been wilfully negligent or had caused any deficiency in the assets of the society, and (4) if they had made any payment, contrary to the Act, rules and bye-laws, etc. In this case the ex-President and ex-Vice-President have been held liable only under the third head, *i.e*, wilful negligence and not under any of the other heads of liability. The learned counsel for the petitioners points out that the circumstances pointed out by the Co-operative Tribunal that the ex-President and the ex-Vice-President did not scrutinise the statement of accounts produced before them by the clerk then and there, and such negligence enabled the clerk to misappropriate such large amounts from the bank cannot indicate that their negligence, if any, is wilful, that there is no material or finding by the Tribunal that the negligence attributed to them is wilful, and that unless wilful negligence is established, section 71 cannot be invoked against them. The learned counsel points out that the Co-operative Tribunal has overlooked the significance of the of the word "wilful" occurring in section 71 and has proceeded on the basis that a mere negligence on the part of the persons in management will bring them under the mischief of section 71.

7. In my view, the petitioner's learned counsel appears to be right when he says that the Tribunal has completely overlooked the significance of the expression "wilful negligence" occurring in section 71, for, after finding that the ex-President and the ex-Directors were negligent in not scrutinising the accounts properly then and there, it straightway proceeds to say that they have rendered themselves liable for an order of surcharge under section 71 for such negligence. Whether their negligence was wilful or not has not been specifically considered.

8. The scope of the expression "wilful negligence" occurring in various statutes had come up for consideration before Courts. In *R.* v. *Downes*[1] it was held that the statutory words "wilfully neglects such child" are not satisfied by proof of some omission to provide medical aid. In *Reg* v. *Senior*[2] while dealing with the same expression "wilfully neglects" occurring in section 1 of the Prevention of Cruelty to Children Act, 1894, Lord Russel, C.J., expressed that whether the words are taken together or separately, the meaning is very clear, that "wilfully" means an act done deliberately and intentionally, not by accident or inadvertence so that the mind of the person who does the act can be said to go with it and that 'neglect' is the want of reasonable care, that is, the omission of such steps as a reasonable person would take. While dealing with the scope of the expression "wilful neglect" occurring in section 2 of the Married Women's Protection Act, 1922, the High Court of Australia in *Cooper* v. *Cooper*[3] stated that the phrase connotes a deliberate and

1. (1875) 1 Q.B.D. 25.
2. (1899) 1 Q.B. 283.
3. 65 C.L.R. 162.

intentional act of a culpable nature and that it imports an intention to act or omit to act in a way which the person charged knows, or ought if he is not recklessly careless to have known, will amount to a breach of duty, P. R. Ramanatha Iyer in his "Law Lexicon" has collected the various decisions interpreting the expressions "wilful neglect" and "wilful negligence." According to the author the expression "wilful neglect" means an act done deliberately and intentionally and not by accident or inadvertence so that it can be said that the mind of the person who does the act goes with it, that it implies an intentional and purposeful omission to do a certain act, and that it is an even more extreme term than gross and culpable negligence. The expression "wilful negligence" according to the author means a conscious acting or failing to act in a reprehensible manner.

9. In *Ardeshir Bhicaji Tamboli* v. *The Agent, G.I.P. Ry. Company, Bombay*[1] the Privy Council dealing with the scope of the phrase "wilful neglect" occurring in a railway risk note issued under section 72 of the Indian Railways Act, 1890, referred to the decisions in *R.* v. *Downes*[2] and *Reg.* v. *Senior*[3] above cited and held on the facts of that case that though there was ample evidence of neglect, there was no evidence or finding of wilful neglect and that therefore there was no wilful neglect within the meaning of the risk note. The Supreme Court in *R. C. N. Kulkarni* v. *State*[4] while interpreting the words "wilfully detains" occurring in section 53 of the Post Office Act, 1898, observed that the word "wilful" has been used by the Legislature to mean only such detention which was deliberate and for some purpose.

10. The above decisions clearly indicate that the use of the phrase 'wilful negligence' in section 71 of the Act is for the purpose of holding a person in management liable if he has caused loss to the society by his intentional and purposeful omission. Therefore, the learned counsel for the petitioners is right in his submission that mere negligence, however gross it may be, may not be sufficient to attract the section.

11. The question is wether the conduct of the ex-President and ex-Vice-President in not checking the amounts properly then and there when presented by the clerk will amount to wilful negligence. It has not been established in this case, nor is there any finding by the Co-operative Tribunal that the negligence attributed to the ex-President and ex-Vice President was wilful in the sense that the omission to check the accounts was intentional and purposeful. It is true, loss has been caused to the society by misappropriation of its funds by the clerk. But the question here is whether the ex-President and the ex-Vice-President are guilty of wilful negligence as contemplated by section 71. A loss can be said to be due to wilful neglect if the cause for loss has been materially contributed by it. In this case the ex-President and the ex-Vice-President have deposed that as there was a secretary supervising the work of the clerk they were of the view that the work of the clerk has been properly supervised by the secretary, and they merely affixed their signatures to the various statements and books of accounts brought before them in view of their confidence in the secretary. It is true, if they had wilfully shut their eyes to facts which were before them and which were sufficient to throw suspicion on the conduct of the clerk or the secretary, they can be held to be guilty of wilful negligence. In this case, however, the methods adopted by the clerk in the process of misappropriation are such that it cannot be detected easily. The methods adopted are to make payments on forged vouchers, to give wrong totals in the account books, to make credits to persons not entitled to credit receipts actually received. The fact that the clerk has been adopting such methods practically from the year 1948 up to 1965 is clear from the enquiry report. The accounts of the bank have been subjected to departmental audit annually and persons who are specially trained for such audit purposes did not detect the misappropriation made by the clerk all these years, and it is only when a special enquiry was ordered under section 65 in relation to the bank's affairs, the *modus operandi* adopted by the clerk for misappropriating the amounts was known. In these circumstances, the

1. (1928) 54 M.L.J. 167: 27 L.W. 667 (P.C.): 55 I.A. 67: A.I.R. 1928 P.C. 24.
2. (1875) 1 Q.B.D. 25.
3. (1899) 1 Q.B. 283.
4. (1954) A.L.J. 822.

ex-President and the ex-Vice-President cannot be expected to be able to detect the misappropriations made by the clerk on occasions when the account books are produced for their scrutiny and signature. Even if normal care has been taken by them before signing the accounts, that would not have brought to light the various acts of misappropriation made by the clerk, for each entry in the account book is supported by a voucher even though forged and false. It is not as if there was any material which could lead to some suspicion against the clerk and such material was overlooked by the ex-President and ex-Vice-President.

12. It has been observed by the Court of Appeal in In re, *National Bank of Wales Ltd*[1].

> "Business cannot be carried on upon principles of distrust. Men in responsible positions must be trusted by those above them as well as by those below them until there is reason to distrust them. We agree that care and prudence do not involve distrust, but for a director honest himself, to be held legally liable for negligence in trusting the officers under him not to conceal from him what they ought to report to him, appears to us to be laying too heavy a burden on honest businessmen".

The Earl of Halsbury, speaking for the House of Lords in *Davey* v. *Cory*[2] said:

> "The charge of neglect appears to rest on the assertion that Mr. Cory like the other directors did not attend to any details of business not brought before them by the General Manager or the Chairman and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors, how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious, if there is such a duty, it must render anything like an intelligent devolution of labour impossible. Was Mr. Cory to turn himself into an auditor, Managing Director, a Chairman and find out whether auditors, Managing Directors and Chairman were alike deceiving them?"

1. (1899) 2 Ch. 629.
2. 1901 A.C. 477.

It is not in dispute in this case that there was a secretary functioning in the bank and it is his duty to supervise the work of the clerk, and it is a case of negligence, if at all, on the part of the secretary to properly supervise the work of the clerk. On the facts of this case, the failure to check the accounts or to detect the misappropriations made by the clerk cannot be said to be due to the wilful negligence of the ex-President and ex-Vice-President. I have to, therefore, hold on the facts of this case that no wilful negligence has been established on their part.

13. The learned counsel for the bank would bring to my notice two decisions of this Court in *Sundaram* v. *Deputy Registrar of Co-operative Societies*[1] and *Kuppuswami* v. *Deputy Registrar of Co-operative Societies*[2] in support of a contention that mere negligence can be brought under the head 'breach of duty' occurring in section 71. In the first case, a Division Bench of this Court held that negligence to perform their duties by persons occupying fiduciary relationship to the society can be brought under the expression "breach of trust" occurring in section 49 (1) of the Madras Co-operative Societies Act of 1932. The same view has also been taken by Kailasam, J. (as he then was) in the second decision where it was held that the negligence on the part of the President of a Co-operative Society which has contributed to a heavy loss incurred by the society as a result of the fraudulent acts of the manager, and the accountant can be brought under the phrase 'breach of trust' occurring in section 49 (1), and therefore action should have been initiated under that section instead of under section 51 of that Act. Section 49 of the Co-operative Societies Act, 1932, refers to only three instances for which a person taking part in the management the society or an officer or a servant can be proceeded against for levy of surcharge, and they are: (1) Misappropriation; or (2) fraudulent retention of any money or property; and (3) guilty of breach of trust

1. (1956) 2 M.L.J. 613: I.L.R. (1957) Mad. 371: 69 L.W. 947 A.I.R. 1957 Mad. 634.
2. (1967) 2 M.L.J. 79: 80 L.W. 445.

in relation to the society. Negligence was not a separate head of liability under that section. Therefore, in the above two decisions, negligence which amounts to breach of a duty was brought under the head "breach of trust." However, section 71 of the Act of 1961 has set out wilful negligence as a new and separate head of liability. When there is a separate head of liability relating to wilful negligence in section 71, it is not possible to bring the same under the head breach of trust. Otherwise, it will defeat the legislative intention to treat negligence as a separate head of liability.

14. On a due consideration of the matter, I am of the view that the petitions have to succeed and the surcharge order so far as it relates to the ex-President and ex-Vice-President will have to be set aside and it is accordingly set aside. Both the petitions are allowed. There will, however, be no order as to costs.

S.J. *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*A. Varadarajan, J.*

Thippa Soundararajan ... *Appellant**

v.

Thimma Venkataraman and others .. *Respondents.*

Hindu Succession Act (XXX of 1956), section 14 (1) and (2)—Joint family properties—Partition deed—Life estate given to widow of deceased coparcener—Property to revert to remaining coparceners on her death—Hindu Succession Act coming into force before death of widow—Whether widow's right enlarged under the Act.

Under a partition deed executed on 25th July, 1919 a life estate was granted to *N*, the wife of a deceased coparcener and on her death the properties were to revert to the remaining four coparceners to be shared by them equally. The Hindu Succession Act, 1956, came to be passed. *N* executed a will in favour of *S* in respect of the properties. The remaining coparceners filed a suit for partition of the properties on the death of *N*. On the question whether on the passing of the Hindu Succession Act, *N*'s estate was enlarged under section 14 (1) thereof,

Held: '*N*' had no pre-existing right in the suit properties and she got she suit properties only under the partition deed whereby she had been given only a limited right to enjoy the properties without powers of alienation and the properties had to revert back to the four coparceners on her death and the case fell within section 14 (2) of the Act and the right acquired by her in these properties for the first time only under the partition deed did not get enlarged under section 14 (1) of the Act.

[*Para.* 7.]

Cases referred to:—

Thatha Gurunadham Chetti v. *Smt. Thatha Navaneethamma*, (1967) 1 M.L.J. 454: 80 L.W. 253: I.L.R. (1968) 1 Mad. 567: A.I.R. 1967 Mad. 429; *Dharma Odayar* v. *Ramachandra Mudaliar*, (1969) 1 M.L.J. 181: 81 L.W. 399; *Hussain Uduman* v. *Venkatachala Mudaliar*, (1974) 2 M.L.J. 275: 87 L.W. 583: A.I.R. 1975 Mad. 8; *Badri Pershad* v. *Kamso Devi*, (1970) 2 S.C.J. 114: (1970) 2 S.C.R. 95; A.I.R. 1970 S.C. 1963.

Appeal against the decree of the Subordinate Judge, Thanjavur, in Appeal Suit No. 23 of 1972, preferred against the decree of the Court of the District Munsif of Thiruvayaru in O.S. No. 232 of 1970.

T.R. Srinivasan and *K. Ramamurthy*, for Appellant.

R. Ranga and *A.L. Natarajan*, for Respondent.

The Court delivered the following

JUDGMENT.—The first defendant, who failed in both the Courts below, is the appellant. The respondents filed the suit for partition claiming one-fourth share in the suit properties.

*S.A. No. 41 of 1973.

20th January, 1976.

2. There is no dispute that the suit properties belonged originally to three brothers— Thimma Venkataraman, Thimma Ramaswami and Thimma Rangaswami. Venkataraman had two sons, Krishnaswamy and Rajaopal. The respondents (plaintiffs 1 to 3) are the sons of Krishnaswamy. Rangaswamy, the third defendant, is the son of Rajagopal. Rangaswami had two sons, Venkatachalapathi and Venkatayyan. Saraswathi, the fourth defendant, is the widow of Venkatachalapathi. Radha, Vardhani and Sarojini, defendants 5 to 7 respectively, are the daughters of Venkatayyan. The second defendant, Nacharammal, is the daughter of Rangaswami.

3. The case of the respondents was that there was a partition between Krishnaswami, Rajagopal, Venkachalapathy and Venkatayyan under Exhibit A-1 dated 25th July, 1919 in which the suit properties were left to be enjoyed by Rangaswami's wife Nagammal for her life, with a direction that they should revert to Krishnaswami, Rajagopal and Venkatachalapathy and Venkatayyan on her death, to be taken by them in equal shares. The respondents, therefore, claimed one-fourth share in the suit properties on the basis of Exhibit A-1, after the death of Nagammal on 3rd October, 1969.

4. The appellant, who claims to be the son of Rangaswami's daughter Alamelu (who is not the daughter of Nagammal), admitted that Nagammal had obtained a limited interest to enjoy the suit properties for herself under the partition deed, Exhibit A-1, but contended that her estate had become enlarged under the provisions of the Hindu Succession Act, 1956, and that he has become the owner of those properties by virtue of the will, Exhibit B-1, which had been executed in his favour by Nagammal. Defendants 5 and 6, whose written statement was adopted by the 4th defendant, denied the will, Exhibit B-1, set up by the appellant and contended that it is a got up document. However, the will does not appear to have been seriously disputed before the Courts below and no issue has been framed regarding its genuineness. But the Courts below found that Nagammal got only a limited interest under the document, Exhibit A-1, and that section 14 (2) of the Hindu Succession Act, applied and that there was no enlargement of the right got by Nagammal under Exhibit A-1, and decreed the suit as prayed for with costs.

5. The learned counsel for the respondents submitted before me that the will, Exhibit B-1, was not seriously disputed before the Courts below. The only point for consideration, therefore, is whether Nagamal was in possession of property which was property under section 14 (1) of the Act and whether her right got enlarged by the provisions of the Hindu Succession Act and the appellant became entitled to the property by virtue of the will, or whether the case is governed by sub-section (2) of section 14 of the Act.

Section 14 of the Hindu Succession Act, 1956, reads thus:

> "14 (1): Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.
>
> (2). Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

The *Explanation* to section 14 (1) makes it clear that 'property' in section 14 (1) includes both movable and immovable property acquired by a female Hindu at a partition or in lieu of maintenance or arrears of maintenance.

6. Provision for the maintenance of Nagammal had been made in the present case in the partition deed, Exhibit A-1, dated 25th July, 1919 whereby Krishnaswamy, Rajagopal, Venkatachalapathy and Venkatayyan had their family properties divided and provision has been made for the enjoyment of the present suit properties by Nagammal, wife of Rangaswami, for her life with a direction that those properties should revert back to Krishnaswami, Rajagopal, Venkatachalapathy and Venkatayyan on the death of Nagammal, who had died on 3rd October 1969. Having regard to the *Explanation*

to section 14 (1), I would have agreed with the learned counsel for the appellan that Nagammal got a right to enjoy the suit properties in lieu of her maintenance and that the properties would be property within the meaning of section 14 (1) of the Act, and Nagammal's right had got enlarged, if there had been no precedent. But, in *Thatha Gurunadham Chetti* v. *Smt. Thatha Navaneethamma and another*[1] one Guruviah Chetty died about the year 1932 prior to the Hindu Women's Right to Property Act, 1937, as in the present case, leaving his widow Thatha Muniamma and four sons. The four sons partitioned their family properties in 1946 under a deed, dated 11th December, 1946, whereby they alloted the properties described in Schedule A to that document to their mother Thatha Muniamma for her maintenance to be enjoyed by her without powers of alienation and those properties were to be taken after her death in the manner mentioned in the deed itself. The property involved in that case was to go to her son Venkatachalam, as per that deed, on her death. But, after the death of Venkatachalam leaving a widow, the plaintiff in that suit, his mother Thatha Muniamma conveyed that property to her other son, Gurunathan Chetti. The widow of Venkatachalam filed a suit for a declaration that the conveyance, by her mother-in-law Thatha Muniamma in favour of her son Gurunathan Chetti was invalid in law. It was contended that the limited right of Thatha Munimma became enlarged under section 14 (1) of the Hindu Succession Act, and that Gurunadhan Chetti had become the owner by her conveyance. Natesan, J. has observed at page 458:

"The first defendant in this case lost her husband prior to the Hindu Women's Right to Property Act, 1937. The only right that she then had under the law was a right to be maintained out of the family properties. She had no title and no right to share in the family properties. The sons could have contended themselves with making a regular money payment and if required charging certain properties for the maintenance amount. But when they partitioned the estate amongst themselves, they set apart property giving her a life estate pure and simple in the property, the property to revert to the sons on her death. The estate given to the widow for her maintenance was restricted to a life estate. She was not granted any powers of alienation. Her right was limited to the enjoyment of the income from the property. What she got under the partition was not the qualified estate of a Hindu female known as woman's estate or widow's estate. She was not even a party to the partition deed as partition could be had only between persons having pre-existing proprietary rights in the property. It follows that the estate given to the widow under the instrument of partition fell under section 14(2) of the Act and that section 14 (1) did not operate on the estate and make the widow a full owner. In the circumstances, any alienation by the widow cannot enure beyond her life-time".

This decision of Natesan, J., was followed by Alagiriswami, J., in *Dharma Odayar* v. *Ramachandra Mudaliar*[1]. There the passage in the decision of Natesan, J., extracted above, had been extracted by the learned Judge and he has added:

"In the present case also Manonmani lost her husband prior to the Hindu Women's Right to Property Act. The only right she had then was a right to be maintained out of the family properties. She had no title and no right to share in the family properties. Her brothers-in-law and father-in-law could have contented themselves with making regular money payments and if required charging a certain property for maintenance. But when they partitioned the estate among themselves they set apart a property giving her a life-estate pure and simple, the property reverting to the sons on her death. The estate given to the widow for the maintenance was restricted to a life estate. She was not granted any powers of alienation. Her right was limited to the enjoyment of the income from the property. What

1. (1967) 1 M.L.J. 454: 80 L.W. 253: I.L.R. (1968) 1 Mad. 567: A.I.R. 1967 Mad. 429.

1. (1969) 1 M.L.J. 181: 81 399.

she got under the partition was not the qualified estate of a Hindu female known as a widow's estate or a woman's estate. It follows that the estate given to the widow under Exhibit A-1 fell under section 14 (2) and section 14 (1) did not operate on the estate and make the widow a full owner. The fact that in the present case Manonmani was also party to the document would not make any differene to this result."

In *Hussain Uduman* v. *Venkatachala Mudaliar and others*[1], a Bench of this Court had to consider the scope of section 14 of the Hindu Succession Act. In that case Survey No. 60/1 and certain other properties belonged to two brothers, Viswanathan and Palaniandi. Sometime prior to his death on 18th February, 1918 Viswanathan executed a partition deed and a will whereby he bequeathed Survey No. 60/1 and certain other properties to his wife Gomathi Ammal. After his death disputes arose between Gomathi and Palaniandi, and Gomathi filed two suits to enforce the partition and will and the suits were compromised on 6th November 1920, and under the compromise decree Gomathi was to enjoy the properties for her life and thereafter they should go to Palaniandi and his heirs. Gomathi died on 8th August, 1964. The question was whether Gomathi got an interest in Survey No. 60/1, only in lieu of maintenance and it did not get enlarged under section 14 (1) of the Hindu Succession Act, 1956. The learned Second Appellate Judge held, as the lower Court held in the present case, that Gomathi had only a right to maintenance and not any pre-existing right to the propery Survey No. 60/1, that the property was allotted to her in lieu of maintenance for the duration of her life and that consequently section 14 (2) would apply and that there could be no enlargement of the right under section 14 (2) of the Hindu Succession Act. The learned Judges have observed at pages 277 and 278:

"A perusal of the section makes it clear that section 14 (1) governs all kinds of estate '*acquired*' by a female Hindu before or after the commencement of the Act, whether by way of inheritance or devise or at a partition or in lieu of maintenance or arrears of maintenance, or by gift from any person or by her own skill or exertion or by purchase or by prescription or in any other manner whatsover, or by way of *stridhana* immediately before the commencement of the Act. On the other hand, sub-section (2) of section 14 which is in the nature of an exception to sub-section (1) provides that nothing contained in sub-section (1) shall apply to any property acquired by a female Hindu by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award, where the terms of the gift, will or other instrument or the decree or order or award '*prescribe*' a restricted estate in such property. In other words the intention of the Legislature was to remove the disability imposed on women by Hindu Law on the ground of sex, but not to interfere with the sanctity of contracts and grants, whereby only a restrictive estate had been deliberately conferred upon them. Sub-section (1) removes the restriction imposed by Hindu Law on the ground of sex, upon the estate held by a woman and enlarges it into an absolute estate. On the other hand, sub-section (2) leaves intact the restriction on the estate of a woman, not imposed by law on account of her sex, but prescribed by the terms of a contract or grant. Some difficulty may arise in the application of sub-section (2) of section 14 to the facts of a given case.

The document, instrument, decree or award may in certain cases of its own force, create a restricted estate in property and may in certain other cases only re-state the restricted estate which the female Hindu possessed even prior to the date of the instrument, decree or award. Before applying sub-section (2), the proper question to ask is, does the instrument or decree 'prescribe' a restricted estate in the propery, or does it merely acknowledge and recognise (and not prescribe) a pre-existing estate upon which the Hindu Law had imposed a restriction, because the holder of the estate was a woman? If before the

1. (1974) 2 M.L.J. 275: 87 L.W. 583: A.I.R 1975 Mad. 8.

date of the deed or the decree, she had no interest in the property and her only source of title is the deed or the decree, which confers upon her a restricted estate sub-section (2) of section 14 of the Act will apply, and such a restricted estate will not be enlarged into an absolute estate under sub-section (1) of section 14. If, on the other hand, the source of her title is independent of the instrument or decree and she held a restricted estate even prior to the date of the instrument or decree and all that the instrument or decree does is merely to recognise the pre-existing restricted estate of the female Hindu then sub-section (1) of section 14 would certainly operate upon the restricted estate and expand it into an absolute one. The Supreme Court in *Badri Pershad* v. *Kanso Devi*[1] has observed as follows:

Sub-section (2) of section 14 is more in the nature of proviso or an exception to sub-section (1). It can come into operation only if acquisiton in any of the methods indicated therein is made for the first time without there being any pre-existing right in the female Hindu who is in possession of the property."

7. In view of these decisions, I agree with the Courts below that Nagammal had no pre-existing right in the suit properties and she got the suit properties only under the partition deed, Exhibit A-1, whereby she has been given only a limited right to enjoy the properties without powers of alienation and the properties had to revert back to the four brothers on her death and that the case, therefore, falls within section 14 (2) of the Act and that the right acquired by her in these properties for the first time only under the document, Exhibit A-1, did not get enlarged under section 14 (1) of the Act.

8. The second appeal, therefore, fails and is dismissed, but under the circumstances of the case, without costs. No leave.

S.J. ——— *Appeal dismissed*

1. (1970) 2 S.C.J. 114: (1970) 2 S.C.R. 95: A.I.R. 1970 S.C. 1963 at 1966.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, J.*

Kistappa Naicker and others .. *Appellants**

v

Elumalai Naicker ... *Respondent.*

Benami—Property purchased by husband in the name of wife—Sale of property by wife—Trespass by son of vendor—Claim that property was joint family property and wife had no right to sell—Suit for declaration by purchaser—Benami found against —Burden of proof rests on person who assets to the contrary.

When a husband purchased property in the name of his wife by paying his own money, from that alone no inference could be drawn that the wife was only a benamidar. Having regard to the nature of the relationship between the parties and the normal tendency of the husband to benefit the wife either by payment of money or by purchase of property in her name, the allegation of benami could be established only by proving the motive for such benami purchase.

[*Para.* 3.]

Once the title stands in the name of a person and somebody comes and asserts that the real title vests in another person and the person in whose name the title deed stands is a benamidar, the burden of proving that the person in whose name the title stands is not the beneficial owner and the beneficial owner is somebody else, is throughout on the person who asserts to that effect and the burden never shifts.

[*Para.* 6.]

Cases referred to:—

Thangayi Ammal v. *Gurunatha Goundan*, (1973) 2 M.L.J. 151: 86 L.W. 261; *Ammaponnammal* v. *Shanmugham Pillai (died)*, 84 L.W. 145: (1971) 1 M.L.J. 272:

*S.A. No. 501 of 1973.

4th February, 1976.

A.I.R. 1971 Mad. 370; *Palani Mudaliar* v. *M. Natarajan*, (1942) 1 M.L.J. 528: 55 L.W. 294: I.L.R. (1942); Mad. 844: A.I.R. 1942 Mad. 503; *Sura Lakshmiah Chetty* v. *Kothandarama Pillai*, 23 L.W. 138: 52 I.A. 286: 49 M.L.J. 109: I.L.R. 48 Mad. 605: A.I.R. 1925 P.C. 181; *Jayadayal Poddar and another* v. *Mst. Bibi Hazara and others*, (1974) 2 S.C.J. 517: (1974) 2 S.C.R. 90: A.I.R. 1974 S.C. 171.

Appeal against the decree of the Subordinate Judge (Principal) of Chingleput in Appeal Suit No. 55 of 1972 preferred against the decree of the Court of the District Munsif of Chingleput in O.S. No. 291 of 1970.

R. Sundaravaradan, for Appellants.

T. Rangaswami Ayyangar and *K. Srinivasan*, for Respondent.

The Court delivered the following

JUDGMENT.—The defendants in O.S. No. 291 of 1970, who succeeded before the trial Court, but lost before the first appellate Court, are the appellants herein. One Palani Ammal is the mother of the first appellant herein. The suit properties stand in the name of Palani Ammal, purchased by her under Exhibit A-2 dated 3rd September 1949 and Exhibit A-3, dated 17th August, 1965. The respondent purchased the suit properties from Palani Ammal under Exhibit A-2, dated 22nd September, 1969. Alleging that the appellants unlawfully trespassed on 5th March, 1970, cut and removed the crops raised by the respondent the suit was instituted for declaration, of the respondent's title to the suit properties and for recovery of possesssion with mesne profits.

2. The case of the appellants was that though the suit properties were purchased in the name of the first appellant's mother, the consideration for the purchase of the properties came from the appellant's father, *viz.*, Madurai Naicker, and therefore, the suit properties were the joint family properties, and Palani Ammal had no title to the properties, and consequently the respondent did not derive any title from Palani Ammal. In short the case of the appellants was that the purchases under Exhibits A-2 and A-3 were benami in the name of Palani Ammal for the benefit of the joint family The learned District Munsif, who tried the suit, accepted this case of the appellants, and dismissed the suit instituted by the respondent. However, on appeal, the learned Principal Subordinate Judge, Chingleput, reversed that conclusion and held that the allegation, of benami put forward by the appellants was not proved, and consequently, Palani Ammal was the owner of the properties and was competent to convey title thereto in favour of the respondent in the suit. With the result, he allowed the appeal preferred by the respondent and decreed the suit as prayed for. Hence the present second appeal by the defendants in the suit.

3. It has been repeatedly held by this Court that when a husband purchased the property in the name of his wife by paying his own money from that alone no inference can be drawn that the wife was only a benamidar, and having regard to the nature of the relationship between the parties, and the normal tendency of the husband to benefit the wife either by payment of money or by purchase of property in her name, the allegation of benami can be established only by proving the motive for such benami purchase —vide *Thangayi Ammal* v. *Gurunatha Goundan and others*[1] and *Ammaponnammal* v. *Shanmugam Pillai (died) and others*[2]. In view of this legal position settled by this Court, *prima facie*, the conclusion of the learned Subordinate Judge is correct.

4. However, Mr. R. Sundaravaradan, the learned counsel for the appellants, contended that there are two decisions, one by this Court and another by the Privy Council holding that when a husband purchased property out of his own money in the name of his wife, the burden of proving that the wife was intended to be the beneficial owner thereof is on the person who claims that the property was the absolute property of the wife. In support of his contention, he relied on the observation contained in a Bench judgment of this Court, *viz.*, *Palani Mudaliar*

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1. (1973) 2 M.L.J. 151: 86 L.W. 261

2. 84 L.W. 145: (1971) 1 M.L.J 272 : A.I.R. 1971 Mad. 370.

and another v. *M. Natarajan* alias *Amalorpavanathan and another*[1]. The relevan statements are found on page 532 of the decision as follows:—

> "Are these facts sufficient to establish an intention on the part of the first respondent to make a gift in favour of his wife ? Krishnaswami Aiyangar, J., did not think they were sufficient and his decision cannot be disturbed unless it is shown to be wrong. The burden is upon the appellants and I am not prepared to say that the burden has been discharged."

It is on the last sentence reliance was placed for contending that this sentence lays down the law that the burden of proving that wife was intended to be the beneficial owner is on the person who claims that the wife was the owner of the property. I am of the opinion that this argument is misconceived. The burden that is referred to in the passage extracted above deals with the burden resting on the appellants to prove that the judgment appealed against is wrong, and the burden referred to in the last sentence has nothing to do with the burden in respect of proving the fact that the wife was meant to be the beneficial owner thereof. Consequently this decision is not of any assistance whatever to the appellants.

5. The second decision on which reliance was placed in the decision of the Privy Council in *Sura Lakshmiah Chetti and others* v. *Kothandarama Pillai*[2]. The relevant statement relied on is:

> "There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a benami transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India."

6. On the face of this, this decision did not deal with any burden of proof at all, and, therefore, the same is also not of any assistance to the appellants herein. Mr. R. Sundaravaradan, the learned counsel for the appellants, made it absolutely clear that in such a case even though the burden in the first instance of proving that the consideration proceeded from the husband is on the person who asserts to that effect, once he has discharged that burden and has established that the consideration proceeded from the husband, the burden shifts to the person who asserts that the property is the property of the wife, to prove that the intention of the husband in so purchasing the property was to make the wife the beneficial owner thereof. I am unable to accept this argument, for there is no scope for the shifting of burden in such a manner in relation to an allegation of benami. Once the title deed stands in the name of a person and somebody comes and asserts that the real title vests in another person and the person in whose name the title deed stands is a benamidar, the burden of proving that the person in whose name the title deed stands is not the beneficial owner and the beneficial owner is somebody else, is throughout on the person who asserts to that effect, and the burden never shifts. This view is clear from a decision of the Supreme Court in *Jayadayal Poddar and another* v. *Mst. Bibi Hazara and others*[1]. There, the Supreme Court observed:

> "It is well-settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften such intention in shrouded in a thick

1. (1942) 1 M.L.J. 528: 55 L.W. 294; I.L.R. 1942 (Mad.) 844: A.I.R. 1942 Mad. 503.

2. 23 L.W. 138 52 I.A. 286: 49 M.L.J. 109: I.L.R. 48 Mad. 605: A.I.R. 1925 P.C 181.

1. (1974) 2 S.C.J. 517: (1974) 2 S.C.R. 90: A.I.R. 1974 S.C. 171.

veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs."

Under these circumstances, there are no merits in the second appeal, and the same fails and is dismissed. There will be no order as to costs. No leave.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT:—*S. Mohan, J.*

The Management of E.I.D., Parry Limited, Ranipet ... *Petitioner**

v.

The Industrial Tribunal, Madras, having its office at the new City Civil Court Buildings, High Court Compound, Madras-1, and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), sections 10, 19—Payment of Gratuity Act (XXXIX of 1972), section 14—Settlement regarding gratuity between management and workmen for a fixed period—Before expiry of the period workmen claiming option for pensionary benefits—Dispute referred by Government—Award by Tribunal in favour of workmen—Reference incompetent.

There were three settlements in the instant case between the management and the workmen regarding payment of gratuity operative from 1st April, 1968, for a period of five years. However before this period was over the workmen claimed for a pensionary scheme and Government referred the matter to the Industrial Tribunal. The Tribunal gave an award in favour of the workmen. On the question whether, the reference was incompetent in view of the settlements,

Held: The settlements undoubtedly were binding and operative and they had the same effect as an award of the Industrial Tribunal. If that be the true legal position, it was not open to the workmen to wriggle out of the settlements by the ingenious device of seeking an option of pension and thereby by-pass the settlement. [*Para.* 7.]

There being no question of option, so long as the settlements were binding and operative, the respondent cannot contend that pensionary benefits were not covered by the settlement. The reference was totally incompetent.

[*Paras.* 8 *and* 10.]

Where the management was obliged to pay gratuity by reason of Central Act (XXXIX of 1972), the provisions of that Act would govern. From this point of view also, the award of the Tribunal was illegal. [*Para.* 11.]

Cases referred to:—

W.C. and S. Mills Company v. *Their Workers*, (1968) 1 L.L.J. 555: (1968) 2 S.C.J. 415: (1968) 1 S.C.R. 581: A.I.R. 1968 S.C. 585; *Thungabhadra Industries Limited* v. *Workmen*, (1973) 2 L.L.J. 283; *Indian Bank Ltd.* v. *Industrial Tribunal*, (1963) 2 L.L.J. 195: (1963) 2 M.L.J. 6: A.I.R. 1963 Mad. 471; *B.T. Manufacturing Company* v. *T.L. Association*, (1960) 3 S.C.R. 329. A.I.R. 1960 S.C. 833: *Sanghvi Jevaraj* v. *M.C.G. and K.M.W. Union*, (1969) 1 L.L.J. 719 (1969) 2 S.C.J. 181: (1969) 2 M.L.J. (S.C.) 38: (1969) 2 An. W.R. (S.C.) 38: (1969) 1 S.C.R. 366: A.I.R. 1969 S.C. 530; *Delhi Cloth and General Mills Company* v. *Its Workers*, (1969) 2 L.L.J. 755: (1969) 2 S.C.R. 307: (1970) 1 S.C.J. 765: A.I.R. 1970 S.C. 919.

Petition under Article 226 of the Constitution of India, praying that in the cir-

*W.P. No. 1561 of 1973. *7th January*, 1976.

cumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in I.D. No. (29 of 1972) on the file of the Court of the Industrial Tribunal, Madras and quash its Award dated 11th December, 1972.

M.R. Narayanaswamy, for Petitioner.

N.G.R. Prasad for *Row* and *Reddy*, for Respondents.

The Court made the following

ORDER:—This writ petition is for *certiorari* to quash the award of the 1st defendant—Industrial Tribunal, made in I.D. No. 29 of 1972 dated 11th December, 1972.

The short facts are as follows:

2. By G.O. Rt. No. 1518 dated 17th June, 1972, the Government of Tamilnadu referred for adjudication two issues between the workmen and the management of E.I.D. Parry Limited, Ranipet. Those two issues are:

1. Whether the demand for extension of accident benefit applicable to the workers who joined service before 1961 to those who joined thereafter is justified and to what relief they would be entitled; and

2. Whether the demand that the workmen who have completed 20 years of service should be given the option of pension instead of gratuity is justified and if so, to formulate a scheme.

On receipt of this reference, the Industrial Tribunal took up the matter for adjudication and answered issue No. 1 in favour of the management and as regards issue No. 2 it held that the workmen who had completed 20 years of service would be eligible for a monthly pension at the rate of 25 per cent of their monthly basic salary and 50 per cent of their average monthly dearness allowance drawn during the 12 months' preceding retirement. It further held that a sum of Rs. 1 for every year of service will be further added on to the pension for service in excess of 20 years and that the workmen who had completed 20 years of service would be given the option as above instead of gratuity. It is this award that is attacked.

3. Before me Thiru M. R. Narayanaswami, appearing for the writ petitioner, the management E.I.D. Parry Limited, would contend as follows: Reference by the Government itself is incompetent because the matters relating to gratuity were covered by three settlements M3 to M5 which came into effect on 1st April, 1968 and were to be operative for a period of five years and that as the matters was covered by these settlements it would not be open to the workmen to opt or to come out of the settlement and ask for pension instead of gratuity. Properly speaking it is that scheme under the settlement which should govern the rights of the parties. In support of this, the learned counsel relies on the decisions in *Bangalore W.C and S. Mills Company* v. *Their Workers*[1] and *Employers Thungabhadra Industries Limited* v. *Workmen*[2]. The next contention is that the Payment of Gratuity Act (C.A. No. 39 of 1972) came into effect on 16th September, 1972 and by reason of sections 4, 5 and 14 it would not be possible for the workmen to ask for gratuity other than what is provided for under the Act. Even section 5 mentions gratuity or pensionary benefits. If it was the case of the workmen that the gratuity that was available under the settlements M3 to M5 were not in accordance with the provisions of the Act, in view of the over-riding effect of section 14, it should be by way of a separate dispute. But this is not the case here. The third contention is that merely because for the clerical staff pensionary benefits were available under Exhibit M7, it would not straightaway mean the workmen concerned in the writ petition would also be entitled in such claim. Even assuming that they would be entitled to such benefits, the Tribunal instead of framing a scheme in accordance with M7 has chosen to frame a scheme in an arbitrary fashion while at the same time purporting to base its conclusion on M7.

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1. (1968) 1 L.L.J. 555: (1968) 2 S.C.J. 415: (1968) 1 S.C.R. 581: A.I.R. 1968 S.C. 585.

2. (1973) 2 L.L.J. 283.

4. Thiru N. G. R. Prasad, the learned counsel for the respondent workmen in meeting these contentions would submit that the pensionary benefits are not the subject-matter of the settlements M3 to M5. Therefore, there is no bar in their opting for the pensionary benefits. Of course, the workmen might not have been entitled to more gratuity but where what is asked for is a totally different retirement benefit, certainly the reference is competent. In order to hold that the reference is competent the test which is applied is whether there is identity or whether the settlement would directly answer the subject-matter of reference. It was so laid down in *Indian Bank Limited* v. *Industrial Tribunal*[1].

5. Section 5 of Central Act XXXIX of 1972 does not in any manner affect or take away the jurisdiction of the Tribunal. It merely says that it will be open to the management concerned to ask for exemption at the hands of the Government. Under more or less identical circumstances, the Supreme Court had held concerning a case relating to provident fund that gratuity could also be asked for in addition to provident fund, *B. T. Manufacturing Company* v. *T.L. Association*[2]. Concerning the merits about the scheme framed by the Industrial Tribunal, the submission of the learned counsel is that M 7 merely formed the basis but if pensionary benefits were to be awarded on that basis it would be an illusory one and therefore sufficient variation was done by the Tribunal in order to afford real benefit concerning pensionary benefits to the workmen. Even otherwise, according to the learned counsel, this Court exercising writ jurisdiction cannot interfere concerning merits.

6. Thiru M. R. Narayanaswami, in reply submits that certainly as long as the scheme is pending and in force the workmen cannot ask for additional gratuity. What is contended now is in lieu of gratuity, whether option could be exercised for pensionary benefits. In *Sanghvi Jeevaraj* v. *M.C.G. and K.M.W. Union*[1] relating to Bonus Act it has been held, that for such of those industries not covered by the Bonus Act, the Tribunal cannot award bonus under the formulae which existed prior to the passing of the Act. The same principle would apply in the instant case also in that after the passing of the Act if really the grievance of the workmen was that the gratuity as awarded under the three settlements was not in accordance with the provisions of the Central Act XXXIX of 1972 even then the scope of the reference should be totally different and not as the one that is done.

7. Before I proceed to examine the merits of these contentions, I may refer to the award of the Tribunal in issue No. 2. The Tribunal has held:

> "The settlements do not cover any pension which is also a retirement benefit. That being so, the settlements cannot be a bar to a claim for a pension scheme. The claim does not affect the gratuity scheme now in existence. The settlements only prevent the workers from asking for more as gratuity. I do not think that they debar them from claiming a separate retirement scheme...... The management has filed an additional counter-statement subsequent to the date on which the Payment of Gratuity Act, 1972 came into force contending that this Tribunal would have no jurisdiction to formulate any pension scheme instead of gratuity. This contention in my opinion has no substance".

I am constrained to remark that the approach of the Tribunal seems to be rather lay than legal. I am afraid, the argument of the management has not been properly appreciated. There is no gainsaying that gratuity is a retirement benefit. It has been so laid down in *Delhi Cloth and General Mills Company* v. *Its Workers*[2] In fact, their Lordships of the Supreme Court said, "gratuity paid

1. (1963) 2 M.L.J. 6: (1963) 2 L.L.J. 195 at 200: A.I.R. 1963 Mad 471.
2. (1960) 3 S.C.R. 329: A.I.R. 1960 S.C. 833 at 839.

1. (1969) 2 S.C.J. 181: (1969) 1 L.L.J. 1719: (1969) 2 M.L.J. (S.C.) 38: (1969) 2 An. W.R. S.C. 38: (1969) 1 S.C.R. 366: A.I.R. 1969 S.C. 530.
2. (1969) 2 L.L.J. 755: (1969) 2 S.C.R. 307: (1970) 1 S.C.J. 765: A.I.R. 1970 S.C. 919.

to workmen is intended to help them after retirement, on superannuation, death, retirement, physical incapacity, disability or otherwise. The object of providing gratuity scheme is to provide a retiring benefit to the workmen who have rendered long and unblemished service to the employer and thereby contributed to the prosperity of the employer". If, therefore, gratuity is a retirement benefit what then is the effect of the settlements M3 to M5? As seen above, those settlements were to be operative from 1st April, 1968, for a period of five years. The reference itself under issue No. 2 is, whether the demand that the workmen who have completed 20 years of service should be given the option of pension instead of gratuity is justified and if so to formulate a scheme. These settlements undoubtedly are binding and operative and they have the same effect as an award of the Tribunal. If that be the true legal position, is it open to the workmen to wriggle out of these settlements by an ingenious device of seeking an option of pension and thereby bypass the settlement. My answer to that would be "no". It is here, the two cases cited by Thiru M.R.Narayanaswami are of great assistance to him. It was held in *Bangalore W.C.* and *S. Mills Company* v. *Their Workmen*[1] that " From this it will follow that when there is a subsisting award binding on the parties, the Tribunal will have no jurisdiction to consider the same points in this reference". Again in *Employers Thungabhadra Industries Limited* v. *Workmen*[2] it was held, where the subject-matter of the reference was almost identical with the matters covered by the prior award which had not been properly terminated under section 19 (6) of the Industrial Disputes Act, the second reference was invalid.

8. From this it will follow that the reference itself is incompetent. I am unable to appreciate the argument of Thiru N.G.R. Prasad that the pensionary benefits were not covered by settlement. It was this approach of the Tribunal which I have earlier characterised as rather lay than legal. This argument ignores the fact that the subject-matter of the reference is whether the workmen could opt for pensionary benefits. There being no question of option, so long as the settlements are binding and operative, it is not correct on the part of the learned counsel for the respondent to contend that pensionary benefits are not covered by the settlement.

1. (1968) 1 L.L.J. 555 at 561: (1968) 2 S.C.J. 415: (1968) 1 S.C.R. 581.
2. (1973) 2 L.L.J. 283.

9. In *Indian Bank Limited* v. *Industrial Tribunal*[1] a question arose before a Bench of this Court as to when the jurisdiction of the local Tribunal would be ousted. In that connection, it was held, an adjudication contemplated by section 10 is of a dispute and it follows that for the purpose of applying clause (6) of section 10, the dispute pending before the Industrial Tribunal and that before the National Tribunal should be the same so that the concerned workers may obtain the relief sought in the local Tribunal from the national Tribunal. Unless there is therefore an identity between the two references, one cannot replace or supersede the other.

10. The question in this case is somewhat different, namely, in view of the binding nature of the settlement, whether the workmen could seek an option for pensionary benefits and therefore this decision does not lend support to the contention of Thiru N.G.R. Prasad. Even otherwise, I find "gratuity" is the subject of settlements M3 to M5 and therefore by reference to those schemes the Tribunal would be in a position to hold that the workmen would be governed by those schemes. So looked at from any point of view, I have little hesitation in coming to the conclusion that the reference is totally incompetent.

11. Central Act XXXIX of 1972 came into force on 16th September, 1972. The reference in this case was on 17th June, 1972. Section 4 of that Act says gratuity shall be payable to an employee on the termination of his employment. Section 5 enables the government to exempt any establishment, factory, mine etc. by notification where the gratuity or pensionary benefits are not less favourabe

1. (1963) 2 L.L.J. 195: (1963)2 M.L.J. 6.

than the benefits conferred under this Act. Section 14 contains the over-riding provision that reads:

> "The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."

By reading this section it follows, if the grievance of the workmen is that the gratuity benefits obtainable under the settlements M3 to M5 are in any way inconsistent with the provisions of the Act, that would be a different dispute altogether and even then it would not enable them to seek for an option of pension benefits. This is where the disjunctive clause under section 5 of the Act, namely, gratuity of pensionary benefits requires to be noted. No doubt, section 5 is only a provision relating to exemption which could be done by the Government by appropriate notification. Nevertheless, if the Tribunal has no jurisdiction in view of my finding that the reference itself was incompetent, the question whether by reason of Act XXXIX of 1972 the jurisdiction of the Tribunal would be barred is again a matter which ought to have been decided independently, but instead all that the Tribunal said was that there is nothing in the Payment of Gratuity Act which says that gratuity is the only retirement benefit which an employee to whom the Act will apply is entitled to receive. Where the management is obliged to pay gratuity by reason of the Act (more so in view of the settlements covered by M3 to M5 which are undoubtedly binding and operative between the management and the workmen) it is the provision of the Act that will govern. From this point of view also I hold that the award of the Tribunal is illegal.

12. The decision in *B.T. Manufacturing Company* v. *T.L. Association*[1] relied on by the learned counsel for the respondent deals with a different situation altogether. That arose under the Provident Fund Act. It was held at page 839:

> "These provisions clearly indicate that the statutory benefits which, in the opinion of the Legislature, are the minimum to which the employees are entitled, cannot create a bar against the employees claim for additional benefits from their employers."

The question here is not additional benefits. At the risk of repetition, I say it is to opt for a pensionary scheme while the settlements under M3 to M5 are still binding and valid between the parties. Therefore, this decision has no application to the facts of the present case.

Lastly, turning to the merits, inasmuch as I have already held that the reference itself is incompetent and the award of the Tribunal is illegal, I do not think it necessary to go into the merits. It is needless for me to mention that it will be certainly open to the workmen to terminate the settlements in accordance with the terms of the settlements or in accordance with the provisions of law and thereafter seek for the pensionary benefits, if so advised.

In the result, the rule nisi is made absolute. There will be no order as to costs.

S.J. ——— *Petition allowed.*

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1. (1960) 3 S.C.R. 329: A.I.R. 1960 S.C. 833 at 839.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*Ramaprasada Rao and S. Maharajan, JJ.*

Mohammad Ibrahim .. *Appellant**

v.

Syed Muhammad Abbubakkar and others .. *Respondents.*

(A) *Civil Procedure Code* (*V of* 1908), *section* 66—*Suit for partition—Property sold in Court auction—Claim that purchaser was a benamidar—Onus on the person who asserts—Effect of section* 66—*Limitation Act* (*XXXVI of* 1963), *sections* 64 *and* 65—*Co-owner's possession when adverse.*

If a person sets up a case of benami title in another, the onus is very heavy on him; besides he should expressly plead that the ostensible title-holder is a benamidar for another and after having said so should expatiate the same by oral and documentary evidence. Section 66, Civil Procedure Code, is intended to put a stop to benami purchases at execution sales and has to be construed strictly. Clause 1 of section 66 effectively makes the certified purchaser the real purchaser and makes such a purchase conclusive evidence that the Court auction-purchaser is a true owner and shall not be liable to be ousted on the ground that his purchase was made on behalf of another. [*Para.* 11.]

(B) *Adverse possession—Co-owner—Whether can set up title without pleading ouster—Requisites.*

It is a fundamental principle of law that a co-owner cannot set up a title in himself by being accidentally in possession of such property to the exclusion of others, unless a specific case of ouster is pleaded and made out. Possession to be adverse must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitior. [*Paras.* 17 *and* 18.]

(C) *Mohamedan law—Joint holding not recognised unlike among Hindus—Acquisition by a member—Not conclusive proof that acquisition was for family.*

The personal law of Muslims does not recognise a system of joint holding as is common amongst Hindus. Acquisition of property independently by a member cannot automatically be said to be for the benefit of the family. The burden of establishing that a property held by a member in a Mohamedan family is his self-acquired property would arise only if the property is held in common by the other members of the family and the entire family lives in commensality possessing the family property in common. Children in a Mohamedan family are not co-owners in the sense that what is purchased by one person enures for the benefit of another.

[*Paras.* 19, 22 *and* 24].

Cases referred to:—

S. K. Karim v. *Mt. Bibi Sakina*, (1964) 6 S.C.R. 780: (1964) 2 S.C.J. 224: A.I.R. 1964 S.C. 1254; *Bangachandra Dhur Biswas* v. *Jagat Kishore Acharya Chowdhri*, (1917) I.L.R. 44 Cal. 186: 43 I.A. 249: 31 M.L.J. 563: A.I.R. 1916 P.C. 110; *Aminaddin* v. *Tajaddin*, I.L.R. 59 Cal. 541: A.I.R. 1932 Cal. 538; *Vellai Mira Ravuthan* v. *Mira Moidin Ravuthan*, (1864) 2 Mad. H.C.R. 414; *Sahul Hamid* v. *Sulthan*, I.L.R. (1947) Mad. 574: (1947) 1 M.L.J. 20: 60 L.W. 24: A.I.R. 1947 Mad. 287; *Maimoon Bivi* v. *Khajee Mohideen*: (1970) 1 M.L.J. 266: 82 L.W. 632: A.I.R. 1970 Mad. 200.

Appeal against the decree of the Subordinate Judge, Coimbatore, in O. S. No. 243 of 1962.

M. S. Venkatarama Ayyar, S. Ramalingam and *S. Palaniswami*, for Appellant.

V. C. Veeraraghavan, K. Sarvabhauman, T. R. Mani and *S. K. Ahmed Meeran*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The third defendant in O.S. No. 234 of 1962 on the file of the Court of the Subordiante Judge.

* A. Nos. 533 of 1969 and 203 of 1970.

18th January, 1975.

Coimbatore, is the appellant in Appeal No. 533 of 1969. Defendants 18 to 20 who are the legal representatives of the 12th defendant in the said suit are the appellants in Appeal No. 203 of 1970. The suit was filed by the plaintiff for partition and separate possession of his 14/144th share in Schedules B to F properties. Sheik Hussain Din I and Sheik Magdoom were brothers. They had considerable properties in which each had a half-share therein. In 1888 Sheik Hussain Din I died leaving behind him his widow Sheikammal, two daughters Varu Ismail Bibi and Khader Hussain Bibi and two sons Khader Hussain Din and Sheik Hussain Din II. Varu Ismail Bibi had a daughter Meeran Bibi who died leaving behind defendants 21 to 24 as her legal representatives. She had another son Syed Mohammed Abbubakkar, who is the plaintiff in the action. Khader Hussain Bibi, the other daughter of Sheikammal died in 1944 and her heirs are defendants 8 to 11. Khader Hussain Din (the first son of Sheikammal) married Rahima Bibi, the 7th defendant in the suit and left behind him his heirs defendants 2 to 6. Sheik Hussain Din II died unmarried on 27th July, 1961.

The 12th defendant is the alienee of some of the suit properties from the heirs of Khader Hussain Din. Defendants 13 to 18 are either the lessees of the suit properties or having an interest therein as encumbrances. As already stated, the plaintiff claims a share in all the plaint schedule properties and would attack *inter alia* the deed of gift executed by Sheik Hussain Din II in relation to certain items of the suit properties and would say that the said hiba would not bind him and the said properties also should be deemed and considered to be family properties in which he has a share. Originally the plaint was filed in the Court of the District Munsif, Udumalpet. As the defendants raised a plea of exclusion of the plaintiff as a co-owner from joint possession of the suit properties and as the jurisdictional value was beyond the jurisdiction of the Munsif's Court, the plaint was returned and thereafter presented in the Sub-Court, Coimbatore, and renumbered as O.S. No. 243 of 1962.

2. The first defendant supports the plaintiff's case. The second defendant' case is that the properties described in schedules B to F did not belong to Sheikammal and her children and in particular he would say that the properties described in the E schedule excepting S.F. No. 163/A-2 were purchased by Khader Hussain Din and Sheik Hussain Din II on 21st June, 1912 from one Khadarsa Rowther of Ayakudi, that the E Schedule properties belonged only to the father of the first defendant and his uncle and that the plaintiff, his mother or grand-mother did not have any right, title or interest therein. It is the case of the defendant that the plaintiff has no right over the B Schedule properties, that the half-share of Sheik Magdoom therein was sold in 1902 itself that defendants 2 to 6 and their uncle Sheik Hussain Din II were adversely in possession of the B Schedule properties, that the plaintiff's mother in an earlier suit filed by her in 1913 did not even claim any share in the said properties and that therefore, the plaintiff has no right to them.

According to this defendant, the plaintiff has lost his right to claim a share in the C Schedule properties by limitation and the plaintiff's mother having filed an earlier suit for partition as early as 1913 and she not having furthered the decree therein, the properties described in Schedules D and F are adversely held by this defendant and the third defendant, adverse to the other heirs and, therefore, the plaintiff's claim to have the properties described in Schedules D and F partitioned and he be allowed his share is unsustainable. According to this defendant and the third defendant the suit properties were in their exclusive possession and were held by them adversely to others and, therefore, the plaintiff's suit for partition as prayed for is not maintainable. As between him and the third defendant the second defendant would say that the gift deed dated 16th April, 1961 is invalid and does not bind him and that he would be entitled to a half-share in the properties of Sheik Hussain Din II.

The third defendant sustains the hiba and pleads that the E Schedule properties are not family properties in which the plaintiff could claim a share. In particular he would allege that Sheik Hussain Din II obtained S.F. No. 163/A-2 on

dharkast from the Government and that, therefore, the plaintiff cannot project any interest therein. He would plead like the second defendant that the B Schedule properties have ceased to be the family properties, and that defendants 2 to 6 and Sheik Hussain Din II were in exclusive possession of the same to the prejudice of the other heirs. A similar contention is raised as regards the properties described in Schedules C and D. He sustains the alienation made by him, and the second defendant and Sheik Hussain Din II to the 12th defendant. On the question of hiba or the gift-deed executed on 16th April, 1961 third defendant's case is that the same is valid gift and the second defendant having attested the same and acquiesced in it cannot question it. Even so, his case is that the properties gifted to him by Sheik Hussain Din II are not family properties. On the whole it is pleaded that the right of the plaintiff and the other heirs of Sheikammal to obtain their respective shares in the properties mentioned of in Schedules B,C,D. and F are barred, as the third defendant and the second defendant were in possession of the same adversely to the other co-heirs. The third defendant also denies the right of the plaintiff to any mesne profits in any one or more of the items of the suit properties. In the additional written statement, the third defendant raised the plea that the present suit is barred by Order 2, rule 2, Civil Procedure Code. The 4th defendant and the 5th defendant sail with the third defendant.

The 6th defendant, however, would say that the gift-deed dated 16th April, 1961 executed by Sheik Hussain Din II in favour of the 3rd defendant is not valid. She would, however, sail with the third defendant that the plaintiff has no right over the E Schedule properties including S.F. No. 163/A-2. She would join with defendants 2 and 3 in asserting that the plaintiff's right over B,C,D. and F. Schedule properties are barred, since those properties were adversely held by others to the prejudice of the plaintiff. She claims her share in the B to F Schedule properties and seeks for a decree for partition in that behalf. The 7th defendant sails along with the 3rd defendant. Defendants 8 to 11 would allege that Khader Hussain Din was managing the entire family properties mentioned in the suit Schedules and that after his death Sheik Hussain Din II was similarly managing the properties and that the income from the properties was being divided amongst variours shares including these defendants and that the possession of the suit properties by Khader Hussain Din and Sheik Hussain Din II was only for the benefit of the family and, therefore, no question of adverse possession would ever arise. They would also allege that certain properties mentioned in the suit Schedules are in their possession and that they are entitled to a 7/48th share in the suit properties and other family properties. They would attack the gift-deed dated 16th April, 1961.

3. The 12th defendant—alienee claims that his purchase is fully supported by consideration and that he purchased the properties from Khader Hussain Din and Sheik Hussain Din II when they were recognised as absolute owners thereof, and that, he, being a *bona fide* purchaser for value, his title to the properties purchased by him has to be sustained. This defendant would also assert that he has made considerable improvements on the properties and has been mortgaging the same for his benefit without any protest by others and that therefore, the properties purchased by him from Khader Hussain Din and Sheik Hussain Din II and their heirs ought to be excluded from being partitioned.

4. The other defendants filed formal written statements. On the above pleadings the following issues and additional issues were framed—

(1) Whether the properties in schedules B to F did not belong to Sheikammal and her children;

(2) Whether F schedule properties exclusively belong to the 3rd defendant;

(3) Whether 3rd defendant had acquired any title by adverse possession and limitation in properties in Schedules B to F;

(4) Whether the plaintiff is estopped from claiming a share in B schedule properties;

(5) Whether 2nd defendant is entitled to the house in Schedule B;

(6) Whether defendants 2 and 3 are entitled to any improvements, if so, to what extent;

(7) Whether the gift deed dated 16th April, 1961 is true, valid and binding on the plaintiffs and other defendants;

(8) Whether the defendants are not liable to render accounts to plaintiff for his share of the income from the suit properties;

(9) To what share the plaintiff and defendants are each entitled?

(10) To what reliefs are the parties entitled?

Additional issues framed on 18th March, 1964:

(11) Whether the possession of the 4th defendant and 7th defendant and their predecessors-in-title have been hostile to the plaintiff and whether they have perfected their title to the properties in their possession by enjoyment over the statutory period adversely to the plaintiff;

Additional issues framed on 6th February, 1965:

(12) To what share is the 6th defendant entitled;

Additional issues framed on 24th February, 1968:

(13) Whether the plaintiff has been in possession of S. Nos. 162/A-1 and 162/A-3 (Schedule E) within 12 years of the suit;

(14) Whether defendants 12, 18, 19 and 20 have perfected their title to S. No. 162, Schedule E by adverse possession;

(15) Whether 12th defendant, the predecessor-in-title of defendants 18 to 20 has carried out improvements and if so to what extent;

(16) Whether the suit is barred by limitation in respect of defendants 12, 18, 19 and 20;

(17) Whether the plaintiff's suit is not maintainable without asking for cancellation of the gift deed;

(18) Whether the suit is in time;

(19) Whether the suit by plaintiff is not maintainable in view of the decision in O. S. No. 1951 of 1913 on the file of the District Munsif Court, Udamalpet;

(20) To what share is defendant 5 entitled?

(21) Whether the suit is barred by Order 2, rule 2.

5. On the first issue, the learned trial Judge came to the conclusion that all the suit properties belonged to Sheikammal and her children. On issue 2, he found that the E schedule properties did not belong exclusively, to the third defendant. On issue 3, he found that the 3rd defendant or any other defendant did not acquire title to the properties described in Schedules B to F to the plaint either by adverse possession or otherwise.

After rendering his opinion on the formal issues 4, 5 and 6, he held that the gift deed dated 16th April, 1961, was not true, valid and binding on the plaintiff and defendants other than the third defendant. On the question of accounting he held against the defendants and on the issues relating to adverse possession he held against the defendants and in favour of the plaintiff and on issue 13 he held that the plaintiff would be entitled to his legitimate share in the E schedule properties excepting the land obtained in dharkhast by Sheik Hussain Din II which is S. F. No. 163/A-2, and also held against the 12th defendant as he was of the view that he could only be a usufructuary mortgagee over the properties purchased by him and ultimately found that the suit was in time and is maintainable. In the result, he granted a preliminary decree for partition and separate possession of the plaintiff's 14/144 share in the suit properties and made the necessary directions which normally follow a preliminary decree for partition.

6. It is as against this, the 3rd defendant and the 12th defendant have come up in appeals already referred to.

7. Though a semblance of an argument was addressed before us on the findings rendered by the trial Court in relation to the properties described in Schedules B, C, D and F, yet no substantial material has been placed before us to interfere with the finding and conclusions of the Court below in relation to the above-mentioned properties. As a matter of fact, at one time this was not even seriously argued or pressed. In the light of this we are not adverting to or canvassing the correctness of the findings of the Court below as regards properties described in Schedules B, C, D and F and hold that the plaintiff and other heirs would be entitled to their legitimate share in it according to their personal law and they should be deemed and held to be family properties.

8. The main controversy, however, is as regards the E schedule properties. We shall advert to the merits of the appeal A. S. No. 203 of 1970 presented by the alienee 12th defendant at a later stage. We shall now consider the broad aspects which touch upon the E schedule properties and find whether the plaintiff's theory that the E schedule properties should be deemed, construed and held as the family properties is correct and sustainable.

9. Under E.A. 1, Sheik Magdoom obligated himself to pay 17 salagais of paddy to Sheikammal and her heirs in consideration of himself being put in possession of the entire family properties which abviously included his half-share therein also. Sheik Magdoom having committed default in the matter of the payment of annuity, Sheikammal had to file a number of suits as is seen from Exhibits B-1 to B-4. Pursuant to a decree obtained by her in O.S. No. 797 of 1899 on the file of the Court of the District Munsif, Udamalpet, a certified copy of which is Exhibits B-4 Sheikammal brought the share of Shaik Magdoom in the E schedule properties to sale through Court. One Khadersa Rowther of Ayakudi purchased the half share of Sheik Magdoom and incidentally also purchased the right of Sheik Magdoom to manage the entire properties which was stipulated in Exhibit A-1. The Court-auction purchase is evidenced by a sale certificate issued in favour of Ayakudi Khadersa Rowther under Exhibit B-5, dated 15th November, 1900. There is evidence to show that Ayakudi Khadersa Rowther took possession of these properties after the issue of the sale certificate and that he had the pattas transferred to his name. These facts are evidenced by Exhibits B 6 and B-8. The case of the plaintiff is that this purchase of Ayakudi Khadersa Rowther was benami for the family and the possession of Ayakudi Khadersa Rowther or his successors-in-interest should always be held to be for the benefit of the Sheikammal and her heirs. Incidentally, it was pointed out that Ayakudi Khadersa Rowther was the husband of the sister of Sheikammal and that it was Sheikammal, who paid the amount towards the Court-auction purchase and that the possession of Ayakudi Khadersa Rowther could only be attributed to the possession of the members of the family of Sheikammal. The learned Judge was inclined to accept this theory.

10. We are unable to share that view. There was no pleading to the effect that the Court-auction purchase under Exhibit B-5 which was about 60 years before the suit was laid was a benami one

11. It is a well-known rule that if a person sets up a case of benami title in another, the onus is very heavy on him; besides he should expressly plead that the ostensible title-holder is a benamidar for another, and after having said so should expatiate the same by oral and documentary evidence. Courts do not allow the weaving and developing of such a plea either in the course of arguments or in the course of trial. Section 66, Civil Procedure Code, is intended to put a stop to benami purchases at execution sales and has to be construed strictly. Clause 1 of section 66 effectively makes the certified purchaser the real purchaser and makes such a purchase as conclusive evidence that the Court-auction purchaser is a true owner and shall not be liable to be ousted on the ground that his purchase was made on behalf of another. Such

being the purport of clause 1 of section 66 it is idle for the plaintiff to tort out a case of benami without pleading the same, nearly six decades after the Court-auction sale.

12. The Supreme Court in *S. K. Karim* v. *Mt. Bibi Sakina*[1] held that the protection available by section 66, Civil Procedure Code, is not only against the certified purchaser but also against any one claiming through him and section 66 bars the claim of a stranger to the bargain. The Court also said that the second sub-section refers to the claims of the creditors and not of transferees, which is dealt with in the first sub-section. A retrospect of the attendant circumstances and facts prevailing at or about the time when the Court-auction sale was held also gives the impression that the sale of the property by Ayakudi Khadersa Rowther in 1901 could not have been benami for Sheikammal or her heirs. We have already seen that Sheikammal had to file successively suits in 1891, 1894 and 1900 under Exhibits B-1 to B-4 for the recovery of small sums such as Rs. 51, Rs. 97--8--0 and Rs. 612. It was in execution of one of those decrees that the property was sold. It has not been brought out that apart from the properties which Sheik Magdoom was administering for and on behalf of Sheikammal, she had any independent means and separate property. The fact that Ayakudi Khadersa Rowther is a relation of Sheikammal does not throw any light on the proposition under consideration. The other circumstances that the creditors were filing suits against Sheikammal and the members of her family as is seen from Exhibits B-1 to B-12 also show that Sheikammal did not have the wherewithal to provide any money to a third party so as to bid at the Cour-auction for her benefit.

The other factor, which also supports the appellants' contention is about the treatment of the E schedule properties by Ayakudi Khadersa Rowther after he purchased the same in Court auction. There is ample material on record to show that it was Ayakudi Khadersa Rowther, who was in possession of the suit properties and even third parties, who had an interest in them, recognised such title and the possession in Ayakudi Khadersa Rowther. Exhibit B-6 is the receipt evidencing the taking over possession of the properties soon after the Court sale was concluded. Ayakud Khadersa Rowther was paying the kist for the land and obtained a patta as is seen from Exhibit B-8 Exhibit B-12 is a suit by a mortgagee over a property which mortgage was effected by Sheik Magdoom. He impleaded Ayakudi Khadersa Rowther as a party to the suit. He is also described as a party, who has purchased the E schedule properties in the Court-auction sale.

It is not in dispute that Sheik Magdoom had other properties, whcih were the subject-matter of the above mortgage suit. Exhibit B-12 is yet another document to show that Ayakudi Khadersa Rowther was in possession of the E schedule properties. Exhibit B-33 was a suit for possession filed by Khaderusunu Rowther *alias* Kokkatti against Sheikammal and her heirs in which suit also Ayakudi Khadersa Rowther was made a party. He was the 10th defendant in that suit and he was specifically impleaded in that suit as the Court auction-purchaser of the E schedule properties. Exhibit B-55 is a suit filed for declaration of title by Sheik Hussain Din II as against his brothers and sisters for recovery of pessession of his 14/48th share in one-half of the suit properties. Therein also both Kokkatti and Ayakudi Khadersa Rowther were made parties. It is seen from the description in the pleadings and in the decree that Ayakudi Khadersa Rowther was recognised by the members of the family of Sheikammal as the party in possession of one moiety of the E schedule properties.

There is again an acceptance by those parties who are interested in the E schedule properties, which points out that Ayakudi Khadersa Rowther was recognised as the person in possession of the E schedule properties. In fact it is not in dispute that items 1 to 9 are the properties which are equivalent to the E schedule properties in the present action. The

1. (1964) 2 S.C.J. 224: (1964) 6 S.C.R. 780: A.I.R. 1964 S.C. 1254.

evidence given by Ayakudi Khadersa Rowther which has been marked as Exhibit B-25 and which is a deposition of his recorded in 1906 shows that he was in possession of the E schedule properties (at any rate one-half thereof as the Court-auction purchaser) But what is contended, however, is that the above material is not sufficient to show that Ayakudi Khadersa Rowther was in possession of the E schedule properties. It is seriously sought to be made out that the purpose of the suit filed by Kokkatti in Exhibit B-33 was to deprive Sheikammal and her children of their share in the B schedule properties, namely, the family house and that the relative prayers in the suits as evidenced by Exhibit B-33 and Exhibt B-55 do not definitely point out that Ayakudi Khadersa Rowther was in possession of the E schedule properties.

13. We are unable to accept this argument, A reference can also be made to Exhibit A-2, which is a judgment in a partition suit filed by Khader Hussain Din, Vavu Ismail Bibi, Khader Hussain Bibi and Sheikammal against Sheik Hussain Din, the first defendant and others for partition of their respective specific shares in plaint items 2 to 9. It is significant that no relief was asked for in respect of E schedule properties. Mr. Meeran, appearing for respondents 7 to 10 would urge that it is possible that the members of the family concentrated in that litigation in denying their claims and contentions and particularly that of Kokkatti Khadersa Rowther and there might have been an omission on their part in the matter of seeking relief in respect of E schedule properties. This is, however, a far-fetched contention.

14. The evidence of D.W. 1 is pressed into service by Mr. V. C. Veeraraghavan, appearing for some of the respondents. There is nothing clinching in the said evidence. There was no doubt no partition of the E schedule properties at any time amongst the members, who are entitled to the same. But this is an insignificant circumstance. Such an inaction on the part of those interested in securing independent possession cannot be put in the forefront to set at naught a Court sale under which Ayakudi Khadersa Rowther became the owner of half of the E schedule properties. In consequence, the title of Khader Hussain Din and Sheik Hussain Din II to such one half-share in the E schedule properties by reason of their purchase under Exhibit B-9 cannot also be ignored.

15. The next pertinent question is as to what was the property which Khader Hussain Din and Sheik Hussain Din II obtained under Exhibit B-9. On 21st June, 1912, Ayakudi sells under Ex. B-9, the property which he purchased in the Court-auction. We have already seen that when Sheikammal brought the E schedule properties to sale and when Ayakudi Khadersa Rowther purchased them in public auction sale, he could have only purchased the title, right and interest of Magdoom. Magdoom had an independent half-share in the E schedule properties: besides, he was in possession of the other half share as a person nominated by Sheikammal to manage the same. Such management of one-half of the E schedule properties automatically came to an end in 1903. The Court sale was held in 1901. The right, title and interest of Magdoom to manage the one-half interest in the E schedule properties might have been the subject-matter of that sale. But such a right by efflux of time came to an end in 1903. Therefore, when Ayakudi Khadersa Rowther sold under Exhibit B-9, the properties which he purchased in the Court-auction under Exhibit B-5, he could have conveyed the half-share in the E schedule properties, which were originally owned by Magdoom. By some inaction or improper action on the part of the other members of the family Khader Hussain Din and Sheikh Hussain Din II continued in possession of the entirety of the E schedule properties. But in law they have acquired only a right, title, interest in the one-half share in E schedule properties and not to the entirety of the same.

16. If this aspect is borne in mind, then the question arises whether the possession of the Din brothers of the other half share in the E schedule properties could be treated as possession adverse to the co-owners of the properties and other members of the family. The other question, which arises for consideration is, whether the Din brothers were in possession of one-half

share of the E schedule properties which they purchased under Exhibit B-9 as representatives of the family of Sheikammal.

17. I shall take up the first question. We have already seen that the Din brothers after 1903 were in possession of the other half-share of the E schedule, not in furtherance of any right vested in them. If they continued in possession, then it should for all purposes be for the benefit of the other sharers and members of the family. It was by accident that they came into possession of the other half-share of the E schedule properties. It is a fundamental principle of law that a co-owner cannot set up a title in himself by being accidentally in possession of such property to the exclusion of others, unless a specific case of ouster is pleaded and made out. In fact, the Din brothers themselves did not at any time make it appear that they have ousted the other members from the other half-share of the E schedule properties.

18. Mr. M.S. Venkatarama Iyer, himself would not stress this question of perfection of title to the other half-share by adverse possession by the Din brothers. Possession to be adverse must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. There is no such evidence. But on the other hand, the Din brothers continued to occupy the other half of the E schedule properties obviously because they were put into possession of the same by Ayakudi Khadersa Rowther, who was in possession of the entirety of the properties as Court-auction purchaser. It may be recalled that the entire E schedule properties were with Magdoom. One-half thereof belonged to him and the other half thereof vested in him as administrator of the same on behalf of Sheikammal. This right was snapped in 1903 when the Din brothers purchased the E schedule properties in 1912. They got back the other half-share and continued to be in possession of the same in a fiduciary capacity and as co-owners of the property. The Din brothers, therefore, cannot project any adverse title in themselves as co-owners. We agree with the trial Court that the other half-share in the E schedule properties was held by the Din brothers as representatives of the family and that one-half share of the E schedule properties is partible amongst the sharers of the Mahomedan family. In the absence of any pleading to that effect, we are unable to disagree with the trial Court on this aspect. We hold that the Din brothers did not perfect their title by adverse possession in so far as the other half-share of the property is concerned.

19. As regards the second question, whether the Din brothers were in possession of one half-share of the E schedule properties purchased by them under Exhibit B-9, as representatives of the family of Sheikammal, we are equally unable to accept the finding of the Court below that such was the position. The personal law of Muslims does not recognise a system of joint holding as is common amongst Hindus. There may be cases, however, where a custom may be set up in the matter of the holding of of such properties by some of the members of a Muslim family whereby it could be established that such possession and title in some of the members is customarily to be interpreted and understood as possession on behalf of all the members. Acquisition of property independently by a member cannot automatically be said be for the benefit of the family. If there is conclusive evidence that a member of the Muslim family, who acquired such properties gained an advantage to himself and caused prejudice to others and if such acquisition is traceable to surplus family assets or funds from and out of which the property could have been purchased, then matters would be different. Again it is also necessary to prove that the members were living jointly and enjoying the property jointly and in common.

A reference to the expression 'Kudumba Thalaivan' in some of the documents is also pressed into service in support of the contention that Khader Hussain Din was treated as the manager of the family. A mere description will not effect legal implications of a given situation. We are not impressed by the argument that as Khader Hussain Din was described as (Kudumba Thalaivan) the general principle applicable to the holding of property by a Hindu joint family manager would automatically have an impact on the facts

of this case and that it should be taken for granted that the half share purchased by the Din brothers under Exhibit B 9, should be held to be for the benefit of the other members of the family.

20. We shall now refer to the decided cases. Exhibit B-9 is a document of the year 1912. The suit is of the year 1962 The document is, therefore, 50 years old.

21. The Privy Council in *Bangachandra Dhur Biswas* v. *Jagat Kishore Acharya Chowdhri*[1], stated as follows:—

> "Recitals in deeds cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. They can only be evidence as between the parties to the conveyances and those who claim under them. After a long period, however, has elapsed between the alienation and the suit to set it aside when all those who could have given evidence on the relevant points have grown old or have passed away, a recital consistent with the probabilities and circumstances of the case assumes greater importance and cannot lightly be set aside. The recital is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible the recital coupled with such circumstances would be sufficient evidence to support the deed."

In the instant case, the other members of the family had ample opportunity to act and establish that Exhibit B-9 should be understood as conferring title on the Din brothers only as representatives of the family. Then such an opportunity was available to them, as is seen from the various litigations fought, they did not agitate this aspect: but, on the other hand, they were satisfied by not claiming a share in the entirety of the E schedule properties. After a long lapse of time as clinching evidence of the intention of the parties cannot be produced, the recitals in Exhibit B-9 may be taken as probablishing the case of the Din brothers that they acquired on-half of the E schedule properties absolutely for themselves and without intending to vest any beneficial interest in the members of the family.

1. 43 I.A. 249: 31 M.L.J. 563: I.L.R. 44 Cal. 186: A.I.R. 1916 P.C. 110.

22. In *Aminaddin* v. *Tajaddin*[1], a Division Bench of that Court laid down the principle thus:

> "Where members of a Mahomedan family live in commensality possessing the family property in common and in jointness, the acquisition by one of the members occupying the position of a managing member, during the jointness of the family will be presumed to be for the benefit of the members of the family not because of any presumption regarding acquisition akin to the joint Hindu family, but because such person is in fiduciary relationship with other members and has an obligation to discharge towards other members and if any property as acquired stands in the name of such person, the burden of proving that it was his self acquired and not the property of the joint family will be on him."

Thus, it is seen that the burden of establishing that a property held by a member in a Mahommedan family is his self-acquired property would arise only if the property is held commonly by the other members of the family and the entire family lives in commensality possessing the family property in common. That is not the case here. It is nobody's case that apart from the Din brothers the one half share in the E schedule properties purchased by them under Exhibit B-9 was held and possessed commonly by the family and they were enjoying it together. It is also not pleaded that the Din brothers held such property in trust for the other members. No doubt this pleading is made as regards the other half share. In so far as the half-share of the E schedule properties purchased by them under Exhibit B-9 is concerned, it cannot be said that there was such a fiduciary relationship between the Din brothers and the other members of the family when they purchased the same.

1. A.I.R. 1932 Cal. 538.

23. In *Vellai Mira Ravuthan* v. *Mira Moidin Ravuthan*[1], the well-known principle that additions made to the joint estate by the managing member of a Mahommedan family will be presumed, in the absence of proof, to have been made from the joint estate, and will be for the joint benefit of all the members of the family entitled to a share, is referred to. But the point is that each case has to be decided on its own merits. It is not the case of the respondents that the properties purchased by the Din brothers under Exhibit B-9 was an accretion made to the joint estate by the Din brothers from the available surplus of the family nucleus. This has to be established factually in order to sustain the contention that the property purchased by the Din brothers under Exhibit B-9 would be the family property. No attempt has been made to do so and even otherwise, there is no evidence to support this contention.

24. Mullah in his Book on the Principles of Mahommedan Law, 17th Edn., page 54, brings out the scope of the principle underlying the discussion thus:

> "When the members of a Mohammedan family live in commensality, they do not form a joint family in the sense in which that expression is used in the Hindu Law. Further, in the Mohammedan law, there is not, as in the Hindu law, any presumption that the acquisitions of the several members of a family living and messing together are for the benefit of the family. But if during the continuance of the family properties are acquired in the name of the managing member of the family and it is proved that they are possessed by all the members jointly the presumption is that they are the properties of the family, and not the separate properties of the member in whose name they stand."

As the theory of representation is unknown to Mahommedan law, and as there is no presumption that acquisition of one or more of the properties of the family are to be presumed to be for the benefit of the family, unless there is proof to the contrary and as stated by Natesan, J. in *Maimoon Bivi* v *Khaji Mohideen*[1], children in a Mahommedan family are not co-owners in the sense that what is purchased by one person enures for the benefit of another.

25. We may usefully refer to the observations of Rajamannar, J., as he then was, in *Sahul Hamid* v. *Sultan*[2]:

> "The Mohammedan law does not recognise a joint family as a legal entity. In fact, according to the rules of the Mohammedan law of succession, heirship does not necessarily go with membership of the family. There are several males and females who have no interest in the heritage but may be members of the family. On the other hand, there are several heirs like, for example, married daughters of a deceased male owner who take an interest in the estate but form no part of the family."

In the instant case, there is no doubt that the female members went out of the family by marriage long before the purchase by the Din brothers under Exhibit B-9. It, therefore, follows that their heirs cannot seek for a share, which is the subject-matter of Exhibit B-9, on the ground that their ancestors were enjoying the property purchased under Exhibit B-9 in commensality with the Din brothers.

26. For all the above reasons, we are unable to hold that the property purchased by the Din brothers under Exhibit B-9, is the family property and that it should be shared by all the sharers in the action. One doubt was raised before us that the Din brothers were not possessed of requisite funds to purchase the property, as they purported to do under Exhibit B-9. It is not the case of the plaintiff that the family of Shaikammal or any other heir provided such funds to the Din brothers. It is in this sense that the argument is a hesitant one and in the nature of *ad miseri cordiam*. Din brothers have become

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1. (1864) 1 Mad. H.C.R. 414.

1. (1970) 1 M.L.J. 266: 82 L.W. 632: A.I.R. 1970 Mad. 200.
2. I.L.R. (1947) Mad. 574: (1947) 1 M.L.J. 20: 60 L.W. 24: A.I.R. 1947 Mad. 287, 290.

majors and it would not have been impossible for them to purchase the properties under Exhibit B-9 for valid consideration.

27. We summarise our conclusions on the E schedule properties thus:

(1) Half of the E schedule properties purchased by the Din brothers under Exhibit B-9 is their properties and the other sharers being the members of the family of Sheikammal do not have any right therein.

(2) The other half-share in the then possession of the Din brothers and now with the third defendant is liable to be partitioned amongst the sharers, as it cannot be said that the Din brothers or their successors-in-interest have perfected their right title to it by adverse possession.

28. The other surviving question is, whether the hiba executed by Sheik Hussain Din II in favour of Khader Hussain Din is valid and enforceable. Exhibit B-39 is the document evidencing such a gift. Under Exhibit B-9, Sheik Hussain Din No. II was entitled to one half-share therein. He was also a sharer under the personal law of the parties in the other half-share of the E schedule properties. What Sheik Hussain Din II did was he gifted away all his right, title and interest in the properties mentioned in Schedules D, E and F to the third defendant. The person, who could at all challenge the gift, is the second defendant, since no one else had any interest or a right to attack the same. The plaintiff, defendants 1, 8 to 11, and defendants 4 to 7, are not the heirs of Sheik Hussain Din II and hence they cannot question the validity of the hiba. But Mr. Ahmed Meeran, learned counsel for respondents 7 to 10, sustains the judgment of the trial Court and says that the gift is invalid.

According to him it was executed 17 days before his death, when he was not in a position to understand what he was doing. Further, according to him he could only give one-third of his estate and not its entirety and that the 2nd defendant as heirs of his did not consent to such an execution of the gift. It is seen that Sheik Hussain Din II died unmarried. We have already expressed the view that defendants 1 and 8 to 11 being the sisters' children and defendants 4 to 7 being the female heirs of Khadar Hussain, are not the statutory heirs of Sheik Hussain Din II. The only person, who could at all challenge the gift is the second defendant. The question is, whether the second defendant can attack the gift deed, its truth or validity. In our opinion, he cannot do so for the following reasons:

(1) The second defendant has attested the said document and he was the willing identifying witness before the Sub-Registrar at the time when the document was registered.

(2) In C.C. No. 508 of 1953, on the file of the Sub-Magistrate, Udamalpet, he says that his uncle had executed gift deed and that he attested the gift and that he went to the Sub-Registrar's office for identifying the executant.

(3) Again, the second defendant in a counter-affidavit filed in I.A. No. 116 of 1961 in O.S. No. 412 of 1956 on the file of the Court of the District Munsif, Udamalpet, refers to the hiba and admits the execution of the same by Sheik Hussain Din II.

(4) Further, in another civil proceeding in E.P. No. 572 of 1963 in O.S. No. 522 of 1941 on the file of the Court of the District Munsif, Udamalpet, the second defendant, who was a party to it, did not question the gift deed. As a matter of fact, the Court in its order, Exhibit B-47, in the above proceedings to which the second defendant was a party, made the following observations:

> "Exhibit A-1 is the registered deed of gift dated 16th April, 1961, executed by Sheik Hussain Din Rowther in favour of the petitioner herein. Under this document all the properties belonging to the deceased executant have been gifted in favour of the petitioner. The truthfulness of the gift deed is not attacked by the contesting respondent."

One of the contesting respondents is the second defendant herein.

(5) Even in the written statement filed in the present suit, it does not appear to

us that the second defendant has raised the plea that the hiba is unsustainable.

(6) The second defendant did not give the impression during the course of the trial of the suit that he was attacking the gift deed. A self-serving opposition raised at the last moment challenging the hiba will not be of any avail to the second defendant. Various acts of omissions and commissions referred to above estop him from contending that Exhibit B-39 hiba is neither truthful nor valid.

29. We, therefore, set aside the finding of the Court below that the hiba is not sustainable.

30. It only remains for us to consider the contentions in A.S. No. 203 of 1970. The 12th defendant died in the course of the proceedings and he is now represented by defendants 18 to 20 who are the appellants. Under Exhibit B-30, dated 9th November, 1949 an extent of 12-1 acres in S. No. 162/A (162/A-,162-A3) was purchased by the 12th defendant from defendants 2, 3, 5, 6 and 7, the heirs of Khader Hussain Din and Sheik Hussain Din II. From the recitals in the document, it is seen that there was ample consideration for the sale. The sale was effected in order to discharge a mortgage debt created by the second and the seventh defendants along with late Khader Hussain Din. The mortgage deed is exhibited as Exhibit B-15 and is of the year 1943. Again the sale consideration went to discharge another mortgage evidenced by Exhibit B-29 executed by the second defendant and late Khader Hussain Din in 1947. A sum of Rs. 1,500 was paid towards a decree obtained against the family of Khader Hussain Din and the balance was received by the second defendant. In the pleadings the plaintiff referred to defendants 12 to 18 as the lessees of the particular property under consideration. The first defendant adopted the case of the plaintiff and even so his legal representatives defendants 21 to 24. It is the contention of the legal representatives that the sale was for the dischage of antecedent debts. Defendants 2 to 7 did not challenge Exhibit B-30. Defendants 8 to 11, on the other hand, while referring to this alienation, characterised the 12th defendant as a lessee, who, it is said, has surrendered possession. But the case of the 12th defendant is that the suit is barred by limitation, that he perfected his title by adverse possession and that ever since the purchase of the property in 1949, he was in possession of it having obtained a patta therefor and was paying the public revenue thereon. He claims that he improved the property considerably. He would also refer to a suit filed by the 4th defendant in O.S. No. 36 of 1962, on the file of the Court of the District Munsif, Udumalpet, in which the matter was practically compromised and his title to the property was recognised. But in the meantime, the present action has been filed in the Sub-Court, Coimbatore. In any event, the 12th defendant s case is that he is a *bona fide* purchaser for value and that he was in possession of the same adversely to others and that his title ought not to be disturbed. It is also seen that the 4th defendant did not even attack the sale in the present action.

31. The trial Court was obviously obsessed with its earlier finding that the E schedule properties are family properties and in that light, it disallowed the claim of the 12th defendant. It would not accept that the 12th defendant perfected his title to this piece of land by adverse possession. It negatived the claim of the 12th defendant that he made any improvements. It, however, accepted that the 12th defendant could only claim to be a usufructuary mortgagee in respect of the property and he has no more interest in it. It, therefore, decided against the 12th defendant.

32. We are not impressed by the argument that the plaintiff's suit is barred by limitation and that the 12th defendant has perfected his title by adverse possession. He was a usufructuary mortgagee and he purchased the property only from Sheik Hussain Din II and the heirs of Khader Hussain Din other than the 4th defendant. The 4th defendant no doubt by his attitude in O.S. No. 36 of 1962 on the file of the Court of the District Munsif, Udumalpet, gave the impression that he was not attacking the title of the 12th defendant. But it cannot be said that the 12th defendant on and after the date of his purchase could have been in possession of the property openly, continuously and adversely to the interest of all the

sharers. The pleadings and the evidence let in do not support this contention. Again, the present action was filed on 23rd March, 1962, originally in the Court of the District Munsif, Udumalpet; but later it was returned for presentation to the Sub-Court.

33. It is also clear from the records that the 12th defendant took possession of the property only on 8th April, 1950. The plaintiff presented the first suit in the Court of the District Munsif, Udumalpet, on 23rd March, 1962. In our view such an institution of the suit by the plaintiff in the first instance in the Court of the District Munsif is on a mistaken impression. Such a process has to be, therefore, understood as a *bona fide* litigation undertaken by the plaintiff. As the date, when the 12th defendant took possession of the property, falls within a period of 12 years, from the date of presentation of the plaint in the first instance, the 12th defendant and the appellants in A.S. No. 203 of 1970 cannot base their claim on adverse possession. Even otherwise the time taken by the plaintiff in prosecuting the suit in a wrong Court but *bono fide* ought to be excluded under section 14 (1) of the Limitation Act.

34. Taking all these circumstances into consideration, we are not impressed with the argument that the 12th defendant has satisfactorily established his title to the property based on adverse possession. Still the question remains whether the sale in his favour has to be set aside. We have already seen that the sale is for the discharge of an antecedent debt. Therefore, the 12th defendant should be considered and deemed to be a *bona fide* purchaser for value. We have to, therefore, accept the sale as a binding one. In the circumstances, therefore, we direct, while upholding the sale in favour of the 12th defendant that at the time of the final decree the property purchased by the 12th defendant may be allotted to the share of the heirs of Khader Hussain Din, namely, defendants 2 to 7 and thus adjust the equities between the parties.

35. In the result, therefore, we allow the appeal in part and modify the judgment and decree of the Court below in the light of our judgment as above. In so far as the decree for accounting is concerned, we are satisfied that defendants 2 and 3 are liable to account to the plaintiff, the heirs of the first defendant and defendants 8 to 11 in respect of one half-share in the E schedule properties, the other half share being heirs, excepting S. F. No. 163/A which, as already observed, was obtained on dharkhast by Sheik Hussain Din and which will be his separate property. Account shall be taken in this behalf at the time of the final decree. The findings of the Court below in so far as they are not inconsistent with the findings rendered by us in the course of our judgment shall stand.

36. As the shares are admitted, we are not touching upon them. The family properties shall be as described in Schedules B, C, D and F and one-half of the E schedule properties, less the dharkhast land comprised in S.F. No. 163/A and also the extent of the land sold to the 12th defendant and now held by his heirs who are appellants in A.S. No. 203 of 1970.

37. In the result, a preliminary decree for partition and separate possession of the plaintiff's 14/144th share in the family properties is passed. The direction as to accounting and mesne profits shall be considered at the time of the final decree proceedings. The sharers, o course, will file a memorandum at the time of the final decree as to what would be their quantified share in the family properties and obtain separate decrees in their favour on the payment of the necessary Court-fee. As the appellants have succeeded in the main, we direct that all the parties bear their own costs in this Court and in the trial Court.

S.J. —— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:—V. Sethuraman, J.

K.S.K. Zafrullakhan .. *Appellant**

v

K. Arunachalam and others .. *Respondents.*

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act* (XVIII *of* 1960), *section* 30 *—Scope and applicability—Applies to part of building also.*

(B) *Tamil Nadu Buildings (Lease and Rent Control) Amendment Act* (XII *of* 1962) *and Tamil Nadu Buildings (Lease and Rent Control) Amendment Act* (XXIII *of* 1973)*—Not retrospective—Inapplicable to proceedings commenced earlier.*

Section 2 (2) of the Tamil Nadu Buildings (Lease and Rent Control) Act defines a 'building' as meaning 'any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes'. Therefore, section 30 (*i*) and (*ii*) would apply even to a part of a building which had been constructed as contemplated by that provision. The definition in section 2 (2) would apply unless the context otherwise required. The context in section 30 (*i*) does not appear to require the ruling out of consideration the definition provision.

[*Paras.* 8 *and* 9.]

Under section 30 (*ii*), as it originally stood, it would apply only to a residential building the whole of whose assessment exceeded Rs. 250 ; and if a tenant was occupying a small portion of a building paying, say, a sum of Rs. 10 per month as rent and the whole building had been assessed on the basis of the rental value of more than Rs. 250 per month as rent then the tenant would not be eligible for the protection extended by the Act. It was this anomaly which was sought to be rectified by the amendment made in 1962, so that the exemption would apply only to a case where the rental portion under the occupation of the tenant exceeds Rs. 250. This was obviously a clarificatory amendment. An existing meaning of a word in a provision does not change by a subsequent amendment of a different one. Therefore the amendment in section 30 (*ii*) does not throw light on the meaning of the word 'building' in clause (*i*) of section 30.

[*Para.* 8.]

Act XXXIII of 1973 either expressly or by necessary implication did not prescribe for abatement of pending proceedings. It would have no application to proceedings commenced earlier.

[*Para.* 10.]

Cases referred to:—

Mohammed Jaffar v. *Palaniappa Chettiar,* (1964) 1 M.L.J. 112; *M/s. Killick Nexon Limited* v. *V.R. Narayana Rao,* (1974) 1 M.L.J. (N.R.C.) 16.

Appeal against the decree of the Court of the Principal Subordinate Judge, Madurai, in Appeal Suit No. 72 of 1972, preferred against the Decree of the Court of the Second Additional District Munsif, Madurai Town, in Original Suit No. 1032 of 1970.

M. Veluswami and *D. Anandan,* for Appellant.

S. Gopalaratnam, P. N. Venugopal and *P.M. Kathiresan,* for Respondents.

The Court delivered the following

JUDGMENT:—In this Second Appeal, the only question that arises is whether the suit building is exempted under the provisions of section 30 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The suit property and the adjoining properties on the east and west belong to the plaintiffs. They were originally constructed with mud walls. Since they were in a dilapidated condition, the plaintiffs claimed to have demolished the same and put up new constructions in the month of December, 1966. The defendant became a tenant in respect of one of the shops so put up on a monthly rent of Rs. 100. Originally he was to occupy the property for only one year. But, even after the expiry of the period of one year, the defendant continued to occupy the shop and did not vacate the premises. The plaintiffs claimed that they required the shop for their convenient enjoyment and also for additional

*S.A. No. 1766 of 1973. 30*th January,* 1976.

accommodation. They pointed out that the entire construction of the property having been completed in 1966, the provisions of section 30 of the Tamil Nadu Buildings (Lease and Rent Control) Act would apply so as to except the building from the operation of the said Act. They, therefore, came forward with a suit in the civil Court praying for recovery of possession of the newly-constructed shop in the possession of the defendant bearing door No. 69, in Tamil Sangam Road, Madurai Town, and for mesne profits.

2. The defendant resisted the suit on the ground that the plaintiffs had effected only minor repairs to the portion of Door No. 69, that the building had not been demolished and reconstructed as required by the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, that the said building was, therefore, covered by the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, and that he was entitled to the benefit of the said Act, so that in the absence of a valid notice to quit and in the absence of proceedings before the authorities constituted under the Tamil Nadu Buildings (Lease and Rent Control) Act, he was not liable to be evicted and was entitled to the benefit of the said Act. He, therefore, contested the suit on the ground that the suit itself was not maintainable.

3. The trial Court held that even though the suit property was constructed in the year 1966, since it was only a portion of the building bearing door No. 69 it was not exempt from that Act so that the provisions of the said Act would apply and that, therefore, the suit for ejectment was not maintainable. The suit was, therefore, dismissed. The plaintiffs, therefore, appealed to the lower appellate Court.

4. The learned Principal Subordinate Judge pointed out in paragraph 6 of his judgment that in the instant case, it was not in dispute that the inpugned shop along with the other shops were recently constructed in such a way that they could be let out separately, that they were let out to independent tenants and that each shop had an independent entrance and was thus capable of being let out separately for non-residential purposes. The learned Judge was inclined to hold that this was a case which would clearly come under the scope and purview of section 30 of the Tamil Nadu Buildings (Lease and Rent Control) Act and that the suit was perfectly maintainable in the civil Court by virtue of the said provisions. Before him there was a plea based on the amendment under Act XXXIII of 1973 to the provision of section 30 of the Act. The learned Judge held that the amendment did not apply to the pending proceedings and that, therefore, the plaintiffs were entitled to the reliefs prayed for. He left open the question of mesne profits to be decided in separate proceedings under Order 20, rule 12, Civil Procedure Code.

5. In the present appeal, the learned counsel for the appellant (defendant) submitted that section 30 of the Act would not apply to the present property. The first part of his objection was that section 30 of the Act provided that.

> "Nothing contained in this Act shall apply to any building, the construction of which was, after the date of the commencement of this Act, completed and notified to the local authority concerned."

and, therefore, the point taken was that it was not a case where there was only construction (as distinguished from repair) of a building, which means a whole building coming within the scope of section 30 of the Act, the construction of which was completed after the Tamil Nadu Act (II of 1962) amending the Tamil Nadu Buildings (Lease and Rent Control) Act. On this point there is a specific statement of the learned Principal Subordinate Judge that it was not in dispute that impugned shop along with the other shops were recently constructed in such a way that they could be let out separately and that they were let out to independent tenants. In the face of this admission in the lower Appellate Court, I do not think it possible to accept the submission of the learned counsel for the appellant so as to require me to go into the question of fact as to whether there was only a repair to the existing building or whether there was a construction of a new building. The Courts below have proceeded on the basis that there was a construction of a new building on the said property. Therefore, I proceed on

the basis that there is a construction of a building as contemplated by section 30 (*i*).

6. The next part of the objection was that section 30 (*i*) required two conditions to be satisfied, namely, that the building must be one, the construction of which was completed after the date of the commencement of the Act and that there must be a notification to the local authorities concerned. The learned counsel took me through the plaint to show that there was no averment therein suggesting that there was any notification to the local authorities concerned. For the respondents, it was pointed out that the defendant had not taken up this point at any stage so far and that if only he had taken up the point at any earlier stage, they could have let in the necessary evidence. My attention is also drawn to the deposition in the trial Court in which it was stated by the first plaintiff as P.W. 1 that after he constructed the new building he intimated the municipality. In the course of cross-examination, he has stated that he did not have any record for any such intimation. He has, however, filed Exhibits A-8 and A-9 to show that as a result of the notice, the municipality had increased the tax for the property. Under Exhibit A-8 dated 12th September, 1966, before the construction was completed, the tax was Rs. 293·37 per half-year. Under Exhibit A-9 dated 14th March, 1968, after the building was completed the tax was increased to Rs. 567·15. This was referred to in the course of deposition.

7. The point for consideration is whether there has been notification as contemplated by section 30 of the Act in the present case. The section only says that 'nothing contained in the Act shall apply to any building the construction of which was, after the date of the commencement of the Act, completed and *notified* to the local authority concerned.' The word 'notified' does not appear to require any written notice If it was so needed, the legislature would have said so. It is enough if there is an intimation given to the municipality and the evidence of P.W. 1 clearly shows that there was such an intimation. I do not, therefore, see any substance in the submission that there was no notification to the local authority concerned so as to satisfy one of the conditions required by section 30 (*i*) of the Act.

8. The learned counsel for the appellant took another point before me, namely, that section 30 would contemplate a whole building being constructed and not a mere part. It was pointed out that the present property bore the same municipal door number as earlier so as to show that the property was only a part that had been constructed. For this purpose, my attention was drawn to section 30 (*ii*) is which the words 'part thereof' have been used so as to show that, the building contemplated by clause (*i*) of section 30 would only be the entire building and not a part thereof. Section 30, as it was enacted originally, ran to the extent relevant as follows:

> "30. Nothing contained in this Act shall apply to—
>
> (*i*) any building the construction of which was, after the date of the commencement of this Act, completed and notified to the local authority concerned, or
>
> (*ii*) any residential building the rental value of which, on the date of the commencement of this Act,
> as entered in the property tax assessment book of the municipal council, district board, panchayat or panchayat union council or the corporation of Madras, as the case may be, exceeds two hundred and fifty rupees per mensem, or
>
> (*iii*).......... ...."

The word, 'building' has been defined in section 2 (2) as meaning "any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes". Therefore, if the definition of the word 'building as indicated in section 2 (2) applied, there can be no doubt that section 30 (*i*) and (*ii*) would apply even to part of a building which had been constructed as contemplated by that provision. The contention of the counsel was that the context required the non-application of the definition. I have carefully considered this submission. I do not find

that there is any substance in it The definition would apply unless the context otherwise required. The context in section 30 (*i*) does not appear to require the ruling out of consideration of the definition provision. The section can be given a proper and reasonable meaning by applying the definition rather than by not applying it There is no anomaly pointed out if the definition is applied. I do not, therefore, see my way to accept this part of submission by the learned counsel.

The learned counsel then drew my attention to the amendment of this provision later. The amendment was actually introduced by Tamil Nadu Act II of 1962. Under that amendment, clause (*ii*) was amended to run as follows :

> "30. Nothing contained in this Act shall apply to—
>
> (*i*)......................
>
> (*ii*) any residential building or part thereof occupied by any one tenant if the monthly rent paid by him in respect of that building or part thereof exceeds two hundred and fifty rupees."

The difference in the wording between the old provision and the provision as introduced in 1962 is obvious. The provision as indicated earlier applied only to a residential building, the whole of whose assessment exceeded Rs. 250. Supposing a tenant was occupying a small part of a building paying, say a sum of Rs. 10 per month as rent and supposing the whole building had been assessed on the basis of the rental value of more than Rs. 250 per mensem, then the tenant would, on the provision as it was, not be eligible for the protection extended by the Act. It is this anomaly which was sought to be rectified by the amendment made in 1962, so that the exemption would apply only to a case where the rental portion under the occupation of the tenant exceeds Rs. 250. This was obviously a clarificatory amendment which came to be passed to get over the anomaly existing in the previous provision. An existing meaning of a word in a provision does not change by a subsequent amendment of a different one. Therefore, the amendment in clause (*ii*) does not, in my opinion, in any way throw light on the meaning of the word 'building' in clause (*i*) of section 30.

9. The learned counsel in order to suppor this proposition that the definition provision need not be read into every other provision of the Act drew my attention to the decision in *Mohammed Jaffar* v. *Palaniappa Chettiar*[1]. The proposition laid down therein, namely, that the definition itself is restricted in its operation only when there is nothing repugnant in the subject or context, is a well-known proposition. The Court was not in a position in that case to apply the definition provision to section 7 (3) (*c*) of the Madras Buildings (Lease and Rent Control) Act, 1949, corresponding to section 10 (3) (*c*) of the Act of 1960 in the context of that particular provision. As I have already indicated, there is nothing in the context of section 30 clause (*i*) which requires me to rule out of consideration the definition provision.

10. Another contention which was taken before me was that the provisions of the amending Act, 1973, would apply to the present case. Clause (*i*) of section 30 was amended by Tamil Nadu Act (XXIII of 1973), so as to run as follows:—

> "30. Nothing contained in this Act shall apply to—
>
> (*i*) any building for a period of five years from the date on which the construction is completed and notified to the local authority concerned; or"

The submission of the learned counsel was that assuming that this building was completed in 1966, the period of exemption would enure only up to 1971 or so and that as we are in the year 1976, the exemption has already run out of force. so that the benefit of the Act would go to the defendant. The counsel was quite fair to bring to my notice a decision reported only in the short notes in *M/s. Killick Nixon Limited* v. *V. R. Narayana Rao*[2]. That was a decision of a

1. (1964) 1 M.L.J. 112.
2. (1974) 1 M.L.J. (N.R.C.) 16.

Bench of this Court in A.S. No. 518 of 1973. The counsel appears to have some doubt as to whether that was a case for fixation of fair rent and whether that decision would have any application to the facts of the present case which is a case of eviction. In that decision, the learned Judges held that the amending Act (Madras Act XXIII of 1973) did not indicate as to what was to happen to the decisions of civil Courts rendered prior to the amendment of section 30 of Madras Buildings (Lease and Rent Control) Act (XVIII of 1960). Therefore, the amending Act it was held, could not be taken to affect pending proceedings or the decisions rendered therein. If the Legislature intended the amendment to be retrospective so as to affect vested rights, the learned Judges held that, it would have made a specific provision for abatement of the pending proceedings and the decisions rendered therein as was done when the amending Act (II of 1962) was passed. It could not be held that Act (XXIII of 1973) either expressly or by necessary implication provided for abatement of pending proceedings. The Court took the view that in the absence of any such provision, it had to be taken that the amending Act was only prospective. This is a decision which is binding on me and it shows that the amendment made in 1973 to section 30 (*i*) would have no application to the proceedings commenced earlier in this case. As I have already indicated, counsel had some doubts as to whether this decision had been rendered in a case where a fair rent had to be fixed. The head-note shows that the judgment was rendered in a suit for ejectment and possession. That suit also had been decreed, as here, prior to the coming into force of the amending Act. Therefore, that decision would squarely apply to the facts here. The amendment restricting the exemption to a period of five years would not help the defendant here. The learned counsel next submitted that if the decision of the Bench were to be applied here, then it would follow that the provisions of section 30, clause (*i*) would have no application to a building like this for ever. It is not necessary for me to consider whether the provision would be out of force with reference to the present building in case the contruction as contended for by the respondents is accepted. The matter does not arise here. Any anomaly as pointed out by the learned counsel would not also justify a conclusion contrary to the specific and clear language of the provision as it was in force in the relevant year. If there is any anamoly as contended by the learned counsel, then the proper forum for getting over the anomaly would be a different one. In the circumstances, I do not see any substance in the plea of some anomaly, imaginary or real so as to come to a different conclusion, on the face of the clear language of clause (*i*) of section 30 as it was in force at the relevant time.

11. In the result, there is no merit in the second appeal and it is dismissed with costs. No leave.

R.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, J.*

The Standard Fire Works Industries, Sivakasi, through its Managing Partner Sri A. Chelladurai .. *Appellant**

v.

M/s. Polite per Agencies, 35-C, Cerish Chandra Bose Road, Calcutta, through one of its partners, Sri Kardazlal Khilnari and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 6, *rule* 18—*Amendment of plaint—Suit on breach of contract—Absence of the word 'damages' in the plaint—Effect—Suit dismissed—Appeal—Petition to amend plaint by adding the words "as damages"—Amendment allowed.*

The use of the word "damages" in the plaint is not necessary provided all the material facts which will give rise to a claim for damages are stated in the plaint. [*Para.* 5.]

*A.S. No 855 of 1971 and
C.M.P. No. 6727 of 1972. 10*th September*, 1975.

Where, notwithstanding that a suit is not described in the plaint as one either for recovery of damages for breach of contract to supply goods or for recovery of the value of goods supplied, if the averments in the plaint are sufficient to establish a claim for damages even though the plaintiff has to establish the actual damages sustained, the plaint can be treated as one for damages and the suit could be disposed of on that basis.

[*Para.* 5.]

Where, as a matter of abundant caution, the appellant (plaintiff) filed an application in the appellate Court seeking to add only the words "as damages" in the plaint paragraph dealing with its right to recover the amounts from the 1st respondent and in the paragraph dealing with the relief portion, and, barring the addition of the two words, the amendment does nor bring into existence a new cause of action nor set forth a new set of facts which will prejudice the respondents, it does not seek to introduce any new claim based on a new set of facts but is only a clarification sought to be made on the very facts set out already in the plaint. The amendment has therefore to be allowed.

[*Para.* 6.]

Cases referred to:—

Leach and Company v. *M/s. Jardine Skinner and Company*, 1957 S.C.J. 313: 1957 S.C.R. 438: A.I.R. 1957 S.C. 357; *Shanti Kumar R. Canyi* v. *The Home Insurance Company of New York*, (1975) 1 S.C.J. 187; *Charan Das* v. *Amir Khan*, (1920) 47 I.A. 255: 39 M.L.J. 195: 13 L.W. 49: A.I.R. 1921 P.C. 50.

Appeal against the decree of the Court of the Subordinate Judge, Ramanathapuram at Madurai, in Original Suit No. 72 of 1969.

C.M.P. No. 6727 *of* 1972:

Petition presented to the High Court to permit the petitioner to amend paragraphs 11 and 14 (*a*) of the plaint by adding the words, "as damages" in paragraph 11 and as damages for each contract in paragraph 14 (*a*).

Subbaraya Aiyar and *Padmanabhan*, for Appellant.

A. Varadarajan, for Respondent.

The Court delivered the following

JUDGMENT:—The plaintiff in O. S. No. 72 of 1969 on the file of the Court of the Subordinate Judge of Ramanathapuram at Madurai is the appellant. It is a registered partnership firm carrying on business in fire works and litho works at Sivakasi under the name and style of "the Standard Litho Works". The first respondent herein is a partnership-firm carrying on business in fountain pens and ball-point pens having its head office at Calcutta and branch office at Madras, the second and the third respondents being its partners. The appellant herein instituted the suit for recovery of a sum of Rs. 11,594·51 with interest. Admittedly, the first respondent herein placed orders with the appellant for delivery of 75,000 calendars. These orders are dated 16th December, 1968 and they have been marked as Exhibits A-6, A-7 and A-8, Exhibit A-6 being Order No. 10151 for 15,000 calendars, Exhibit A-7 being Order No 10152 for 30,000 calendars and Exhibit A-8 being Order No. 10154 for another 30 000 calendars. They all originated from a telegram sent by the first respondent on 14th December, 1968, marked as Exhibit A-10. That telegram stated "supply additional 15,000 on 28th instant. More thirty thousand delivery wanted, 15th January and thirty thousand January last week." The word "more" has to be understood in the context of the first respondent having earlier placed orders with the appellant for calendars and having received them. It was the understanding of the parties that this telegram received from Calcutta with regard to the supply of calendars has to be confirmed by the Madras office of the first respondent, because the calendars had to be supplied only to the Madras office. As a matter of fact, such a confirmation was actually sent only on 4th January, 1969 as evidenced by Exhibit A-9, 30 000 calendars were despatched on 29th January, 1969, another 30,000 calendars were despatched on 5th February, 1969 and 15,000 calendars were despatched on 10th February, 1969. The calendars despatched last, *viz.*, 15,000 on 10th February, 1969, were taken delivery of and paid for by the first respondent, but the 60,000 calendars despatched, *i.e.*, 30,000 on 29th January, 1969 and 30,000

on 5th February, 1969, were not taken delivery of by the first respondent and therefore, the appellant had to re-book the same and thereafter, the appellant instituted the present suit for recovery of the amount mentioned therein, made up of Rs. 10,422·36 being the amount covered by the two bills dated 30th January, 1969 and 6th February, 1969 and a sum of Rs. 291·75 said to be the expenses incurred by the appellant for booking and re-booking and a sum of Rs. 867·30 being the demurrage alleged to have been suffered by the appellant herein.

2. Several defences were taken by the respondents herein and they are reflected in the following issues framed by the trial Court:

(1) Whether time is of the essence of the contract?

(2) Whether there has been breach of the terms of the contract by the plaintiff?

(3) To what relief is the plaintiff entitled?

and the following additional issues framed, *viz.*,

(4) Whether this Court has no jurisdiction to try this suit?

(5) Whether the suit as framed is not maintainable?

(6) Whether the letter dated 8th January, 1969 will not bind the third defendant? and

(7) Whether any definite dates were fixed for the supply of calendars and whether there was any delay in despatching the same?

3. The learned Subordinate Judge of Ramanathapuram at Madurai, by judgment and decree dated 5th March, 1971 came to the conclusion that time was not of the essence of the contract and 60,000 calendars were supplied by the appellant in accordance with the instructions given by the first respondent under Exhibit A-12 dated 8th January, 1969 and there has been no breach of contract on the part of the appellant, that there was no delay on the part of the appellant in despatching the goods, and therefore, answered all the material issues, except the relief, in favour of the appellant herein. As far as the relief portion is concerned, the learned Subordinate Judge held that the appellant had not filed the suit for recovery of any damages on the ground of breach of contract and the grievance of the appellant was that the respondents had failed to take delivery of the goods and therefore they were liable for the claim made by the appellant and such a claim can only be for damages on the ground of breach of contract and therefore, the suit itself was not maintainable. With the result, the learned Subordinate Judge dismissed the suit. It is against the dismissal the plaintiff has filed the present appeal.

4. The appeal itself was filed on 24th July, 1971 and on 4th November, 1971 the appellant also filed an application in C.M.P. No. 6727 of 1972 for amendment of the plaint to get over the defect pointed out by the learned Subordinate Judge.

5. As far as the dismissal of the suit is concerned, I am of opinion that even without an amendment to the plaint being necessary, the learned Subordinate Judge could have decreed the suit on the findings arrived at by him. Only in paragraph 12 of his judgment the learned Subordinate Judge considers this question and states:

"*Additional Issue No.* 5:

Though I have found all the aforesaid issues in favour of the plaintiff, I am afraid that I must hold on this issue that the suit as framed is not maintainable. As rightly urged on behalf of the defendants, the plaintiff has not filed this suit for recovery of any damages on the ground of breach of contract. The grievance of the plaintiff is that the defendants have failed to take delivery of the goods and therefore, they are liable for the claim made by him. Such a claim can only be for damages on the ground of breach of contract. My attention was drawn to section 73 of the Contract Act for the aforesaid position. I read the plaint carefully to find out as to whether this suit can be construed as a suit for damages. Even if the word 'damages' does not find a place in the plaint, if the substance of the suit is one for damages, I thought that the plaint can be construed as one for damages. But

the plaint expressly proceeds on the footing that the suit has been filed for the value of the goods as per bills. It is stated in paragraph 10 that the defendants are liable to pay the plaintiff the sum of Rs. 10,422-86 being the amount covered under the two bills. It is also mentioned in the plaint in paragraph 14 under the heading, 'particulars of amount claimed', that the plaintiff is entitled to the suit amount as per his accounts. The relevant ledger page 184 of the defendants (*sic*) has been marked as Exhibit A-21. In Exhibit A-21 debit entries for the amounts covered by the bills have been made. Admittedly, the plaintiff has re-booked the goods to Sivakasi and he has taken back the 60,000 calendars sent to the defendants. In fact the plaintiff has also claimed the re-booking charges and also the demurrage charges. But anyhow, on the basis that the goods have been supplied to the defendants and that the defendants have failed to pay the value of the goods, this suit has been filed for recovery of the value of the goods."

I am clearly of the opinion that the learned Subordinate Judge has erred in construing the plaint in this manner. As the learned Subordinate Judge himself has pointed out, the use of the word 'damages' in the plaint is not necessary provided all the material facts which will give rise to a claim for damages are stated in the plaint. The learned Subordinate Judge made one mistake when he stated that the plaint expressly proceeded on the footing that the suit has been filed for the value of the goods as per bills. Just as the word 'damages' is not present in the plaint, equally the plaint does not say that the suit has been instituted for recovery of the value of the goods or the price of the goods supplied. As a matter of fact, the very fact that the plaintiff-appellant added the cost of the booking and re-booking of the goods and also demurrage charges will clearly show that the appellant was not instituting the suit expressly for recovery of the price of the goods supplied. Consequently, the learned Judge erred in construing the plaint as one instituted for recovery of the value of the goods. On the other hand, even though the suit has not been described as one either for recovery of damages or for recovery of the value of the goods supplied, still the averments in the plaint are sufficient to sustain a claim for damages, even though the appellant had to establish the actual damages sustained by it. As a matter of fact, in paragraph 8 of the written statement, the third defendant himself averred that he learnt that the appellant took re-delivery of the goods and disposed of the same and the appellant, therefore, did not incur any loss. The appellant incurring or not incurring any loss will be relevant only for determining the claim of the appellant to damages and not for recovery of the price of the goods. It is true, it was the third defendant who stated in the written statement more than once that the appellant was not entitled to claim the value of the calendars, but that would not determine the relief claimed by the appellant itself in the plaint. Therefore, even the plaint, as it stands, can be treated as being one for damages and the learned Subordinate Judge could have disposed of the suit on that basis.

6. It is only as a matter of abundant caution, the appellant has filed the present application, C.M.P. No. 6727 of 1972, for amendment of the plaint, and the only amendment it seeks to make is the addition of the words, 'as damages' in paragraph 11 of the plaint dealing with its right to recover the amounts from the first respondent herein and in paragraph 14 dealing with the relief portion. Barring the addition of these two words 'as damages' the amendment applied for does not seek to add anything more to, or detract anything from, the plaint. The learned counsel for the respondents vehemently opposed the application for amendment. I am unable to hold that there is any merit whatever in this objection. As a matter of fact, so long as all the necessary averments in the plaint are there, as they are in the present case, if the plaintiff wants merely the addition of the words 'as damages' in order to clarify the basis of its claim, it could not be contended that the amendment brings into existence now cause of action or sets forth new set of facts which will prejudice the respondents herein. The decision of the Supreme

Court in *Leach and Company., Ltd and another* v. *M/s. Jardine, Skinner and Company*[1], is directly in point. In that case the Supreme Court allowed an amendment of the plaint as one for damages for breach of contract and, on that basis, allowed the appeal and remanded the matter to the trial Court for fresh disposal. As a matter of fact, that decision of the Supreme Court is nearest to the facts of the present case. However, the learned counsel for the respondents drew my attention to the decision of the Supreme Court in *Shanti Kumar R. Chanji* v. *The Home Insurance Company of New York*[2] (C.A. No. 199 of 1971, dated 24th July, 1974 of Supreme Court, judgment dated 24th July, 1974). In that case, there were two amendment applications and the earlier application having been dismissed, the second application was filed and that too was dismissed. With reference to that dismissal the Supreme Court observed:

> "The High Court considered the second application for amendment to be a new claim based on the new set of facts which become barred on the date of the application for amendment. In exceptional cases an amendment has been allowed where the effect is to take away from a defendant a legal right which has accrued to him by lapse of time, because the Court found that consideration of lapse of time is out-weighed by the special circumstances of the case. See *Charan Das* v. *Amir Khan.*[3] The High Court rightly found that there were no special circumstances to entitle the appellant to introduce by amendments such claim."

In my opinion, the said decision of the Supreme Court has no application to the facts of this case, because as I pointed out already, the amendment does not seek to introduce any new claim based on a new set of facts and it is only a clarification sought to be made on the very facts set out already in the plaint. Under these circumstances, the application for amendment, filed as a matter of abundant caution, is allowed and the plaint will stand amended as prayed for.

7. Since the learned trial Judge has not considered the claim of the appellant as one for damages, the suit will have to go back to the learned Subordinate Judge for re-trial only on the question whether the appellant had established that it had sustained any loss so as to claim damages from the respondents herein for breach of contract, all the other issues having been already found in favour of the appellant herein.

8. The learned counsel for the respondents sought to sustain the judgment of the trial Court on the ground that the appellant itself was guilty of the breach of the contract and it was not the first respondent that was guilty of the breach of the contract and therefore, even on the assumption that the suit is one for damages, it is liable to be dismissed. The basis of this contention is that the two consignments of 30,000 calendars each were not sent in time. I am of opinion that there is no force in this contention. I have already drawn attention to Exhibit A-10 dated 14th December, 1968, the telegram sent from Calcutta placing orders for the 75,000 calendars, which also stated as to when the first 15,000 calendars should be sent and the second 30,000 calendars and the third 30,000 calendars should be sent. I have also referred to the fact that actually the orders were placed on 16th December, 1968. But, it was admitted that a confirmation from the Madras office, to which alone the calendars had to be sent, was necessary and that confirmation came into existence only on 4th January, 1969 as evidenced by Exhibit A-9. Therefore, if this confirmation is to be taken into account, it will follow that the time schedule mentioned in Exhibit A-10 dated 14th December, 1968 cannot have any effect because it contemplates the first consignment of 15,000 being sent on 28th December itself, and the confirmation having come later, Exhibit A-10 could not be complied with literally. Apart from this, after Exhibit A-9 there was a further communication, *viz.*, Exhibit A-12 dated 8th January, 1969 sent by the Madras office of the first respondent to the appellant herein. The said communication reads as follows:

1. 1957 S.C.J. 313 : (1957) S.C.R. 438 : A.I.R. 1957 S.C. 357.
2. (1975) 1 S.C.J. 187.
3. (1920) 47 I.A. 255: 13 L.W. 49: 57 I.C. 606: 39 M.L.J. 195: A.I.R. 1921 P.C. 50.

"Ref. No.................

The Standard Litho Works, P.B. No. 56, Sivakasi (S. India).

Dear Sirs,

Ref: Our Order No. 10152 dated 16th December, 1968.

Our Order No. 10154 dated 16th December, 1968.

With reference to our above order, kindly despatch them with minimum 10 days gap in two separate lots viz, one consignment of despatch during the last week of this month, the other consignment to the despatched by first week of next month................"

This communication actually contemplated 30,000 calendars being sent in the last week of January, 1969 and another 30,000 calendars being despatched in the first week of February, 1969, and that is exactly what the appellant had done, having despatched 30,000 calendars on 29th January, 1969 and another 30,000 calendars on 5th February, 1969. The argument of the learned counsel for the respondent is that this communication, Exhibit A-12, cannot outweigh the original order, Exhibit A-10 dated 14th December, 1968, and these two consignments not being in accordance with Exhibit A-10, the appellant had not complied with the terms of the contract and consequently it committed breach of the contract. I am unable to accept this argument. I have already pointed out that in view of the confirmation from the Madras office itself having come only 4th January, 1969, the terms as per Exhibit A-10 could not be complied with literally. Apart from this, this Exhibit A-12 expressly refers to the two orders relating to 30,000 calendars each. I have already mentioned the fact that order No. 10152 dealt with 30,000 calendars and order No. 10154 dealt with the other 30,000 calendars. It is these two orders which are specifically referred to in Exhibit A-12 and consequently, the instructions contained in Exhibit A-12 related to these two consignments of 30,000 calendars each and the appellant had carried out those instructions in despatching the two consignments on 29th January, 1969 and 5th February 1969 and therefore, having regard to the express reference to the two orders in Exhibit A-12, the argument of the learned counsel for the respondents that the contents of Exhibit A-12 are merely illustrative cannot be accepted. The irony of it is 15,000 calendars which were to be sent on the 28th of December, 1968 as per Exhibit A-10 were sent last on 10th February, 1969 and the same was accepted and paid for by the first respondent, while the two consignments in question despatched before 10th February, 1969 were not taken delivery of, and this conduct on the part of the first respondent itself would show that even the first respondent itself did not consider that the time schedule mentioned in Exhibit A-10 was inflexible and was of the essence of the contract. This is the only ground on which the dismissal of the suit by the trial Court, was sought to be sustained by the learned counsel for the respondents, and that ground fails.

9. Under these circumstances, the appeal is allowed and the judgment and decree of the learned Subordinate Judge of Ramanathapuram at Madurai dated 5th March, 1971, so far as it concerns with the dismissal of the suit will be set aside and the suit itself is remanded to the learned Subordinate Judge for fresh disposal, limited to finding out whether the appellant had suffered any loss as a result of the breach of contract committed by the first respondent in not taking delivery of the two consignments of 20,000 calendars each, and if so, what is the quantum of damages to which the appellant is entitled from the respondents herein. The appellant is entitled to the costs of this appeal from the respondents herein. in view of the attitude adopted by the respondents. The appellant will be entitled to the refund of the Court-fee paid on the memorandum of appeal.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—T. *Ramaprasada Rao* and *S. Ratnavel Pandian*, *JJ.*

State of Madras represented by the Collector of Tiruchirapalli .. *Appellant**

v.

Mahatmaji Manavar Unavu Viduthi, a Society registered under the provisions of the Societies Registration Act of 1860; No. 9 of 1955 represented by the Secretary K. K. Veluswami Udayar .. *Respondent.*

Government grant—Grant of land to society to put up hostel—Composite property—Subsequent resumption by Government of entire property—Possession of building and management of hostel taken over—No compensation offered to society—Society entitled to compensation for building put up at its cost.

Whenever the State Government entertains subjectively an opinion that a particular property which it granted earlier under the Government Grants Act to a citizen is required for a public purpose of its own choice, then it would not matter if the public purpose for which such resumption is thought of is similar to or parallel to the public purpose for which the property is being used or utilised. The subjective satisfaction of the State as to whether a particular property is needed for a public purpose is not normally justiciable; it would therefore be difficult for the Court to embark upon an investigation or enquiry into the propriety of such a public purpose. The only question that has to be looked into is whether the power is being exercised for a public purpose and is in the public interest. Other considerations and comparative hardships could not come into the picture. The fact that the relevant provision under which the power has been exercised has not been stated in the various forms and processes mentioned by the State to achieve the objective would not defeat the very purpose for which such steps were undertaken. Hence the only question in the instant case is whether the State had the requisite authority under any known provision of law to take over the hostel building which had been put up by the grantee, to which it had contributed apart from Government funds. If such power could be traced to an indefeasible provision, may be under a State grant or may be under any provision of statute, then the absence of any reference to it in the correspondence which ensued between the State and the grantee would not belie or belittle the exercise of such power which is admittedly vested in the State. [*Paras* 5, 6.]

It is fundamental that if a composite property consisting of private property and property subject to a Government grant, is taken over under some process of law simultaneously it is but necessary that the private citizen should be compensated for that part of the property to which he contributed without reference to the Government funds. [*Para.* 10.]

Cases referred to:—

Abdul Hussain v. State of Gujarat, (1968) 2 S.C.J. 425: (1968) 1 S.C.R. 597: A.I.R. (1968) S.C. 432; *R. L. Arora v. State of Uttar Pradesh*, (1964) 6 S.C.R. 784: (1964) 2 S.C.J. 652: 34 Comp. Cas. 487: (1964) 2 M.L.J. (S.C.) 148: (1964) 2 An.W.R (S.C.) 148: (1964) 2 Comp. L.J. 309: A.I.R. 1964 S.C. 1230.

Appeal against the decree of the Second Additional Subordinate Judge, Tiruchirapalli in Original Suit No. 42 of 1967.

The Additional Government Pleader, for Appellant.

V. Ratna Mudaliar and *R. Shanmugham*, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, *J.*—"Mahatmaji Manavar Unavu Viduthi", the plaintiff in O.S. No. 42 of 1967 was originally run under the private management of one K. K. Velusamy Udayar. In course of time, the institution expanded and consequent upon the institution's desire not to run with the then provision by the Government at Rs. 15 per mensem,

* Appeal No. 445 of 1971. 15*th September*, 1975.

it requested the Government in the year 1954 for the grant of Government land so that they could put up a decent building thereon for the purpose of running a hostel for the depressed classes. Then the management was asked to register the society under the Societies Registration Act so that they could avail themselves of the public grants which the Government would make in such circumstances. Accordingly, on 12th March, 1955, the plaintiff-society was registered and Mr. K. K. Velusamy Udayar was elected as the Secretary and Manager of that society. After registration, the society pursued its request for the grant of land and also for a loan to put up a decent building thereon and on 28th July, 1956, under Exhibit A-2, 39 cents of land was assigned or to use the normal expression used in such circumstances was "alienated" in favour of the society for the avowed purpose of putting up a construction thereon and for running a hostel. On 21st September, 1956, a provision was made by the Government whereunder a grant of Rs. 10,800 was made. This Rs. 10,800 consisted of the grant made up of a sum of Rs. 6,000 granted by the State Government and the balance of Rs. 4,800 by the Central Government. The society also made its contribution in the shape of labour etc. in putting up a decent structure. Some time thereafter, some additional buildings were put up again with the aid of the Government grant. Some years thereafter to wit in 1959 there were certain reports against the normal working of the hostel. We are not, however, concerned in this case with the complaints laid against the management of the hostel as ultimately it happened that the Government resumed the land and took possession of the buildings thereon, the former under the express power vested in them in clause 8 of the terms of the grant, Exhibit A-2 and the latter, as by then, became affixed to the land and formed part and parcel of the same. The Government, in or about July, 1959, laid down a policy to cover all subsidised hostels in the State by stages and for that purpose under G.O. Ms. No. 2312, Department of Industries, Labour and Co-operation, issued a notification to that effect and directed that 3 hostels in Madurai District recognised for grant of residential scholarships and detailed in items 21 to 23 of the Annexure to the above Government Order be taken over and run by Government during 1959-60. The Director of Harijan Welfare was requested to draw up a phased programme to take over all the remaining subsidised hostels within a specified period and submit the programme for the approval of the Government. The twentieth listed hostel in the annexure to the above Government Order is the plaintiff-society. Pursuant to this, the society was informed under Exhibit B-10 dated 9th June, 1959 that the management of the hostel would be taken over under the control of the Government shortly and that orders for taking over of the hostel would be issued separately. This was followed by Exhibit B-15 dated 13th June, 1959, which was the proceedings issued by the Collector of Tiruchirapalli. In this order, Exhibit B-15, the Collector refers to the general orders issued by the Government to resume Mahatmaji Manavar Unavu Viduthi (subsidised hostel) at Turaiyur and demanded that the management should surrender possession of the buildings. But, unfortunately, the rule under which the power of requisition was being adopted was not mentioned in the above proceedings. Ultimately, it happened that the Deputy Tahsildar took charge of the hostel on 16th June, 1959, from the plaintiff. Aggrieved by the said actions which according to the plaintiff are neither proper nor legal, the plaintiff filed a suit in *forma pauperis* seeking for restoration of the building to the plaintiff-society. As no malpractices have been alleged against the society and as one of the buildings taken over by the Government from the society was constructed at the cost of Rs. 13,646.68 P., the action of the Government in taking over the entire buildings including that constructed by the plaintiff without even an offer for compensation and without paying any compensation till the plaintiff-society came to Court, is highly inequitable besides being illegal. It was in those circumstances that the suit was filed. The Government in its written statement has taken up the position that the suit is not maintainable,

that the hostel was taken over by the Government in public interest and for running the hostel departmentally and that in exercise of their powers under condition 8 of Exhibit A-2, the property was taken over and the land, where the buildings were constructed, is Government land alienated for a specific purpose and that the Government could acquire the same if they required it for a public purpose. The defendant would allege that the hostel was taken over only for a public purpose as the plaintiff could not run the hostel efficiently and in accordance with the avowed policy of the Government to take over such subsidised hostels and run the same for the benefit of the depressed classes to their advantage. They would refer to the hostel and the grant and would say that the Government also did contribute a major portion towards the construction of the buildings and as those buildings and that put up by the plaintiff did form one integral part, the Government had to take over the entire property after giving a prior notice to the hostel authorities. They would refute the claim of the plaintiff that it is entitled to recover possession of the lands and the properties taken over by the Government.

2. At this stage, we may refer to the relief asked by the plaintiff in the plaint. He only sought for redelivery of possession of the suit properties against the defendant and did not ask for a relief in the alternative for payment of such just compensation for the properties belonging to the society which were taken over by the Government without even offering compensation therefor.

3. The learned Subordinate Judge of Tiruchirapalli, on the above material pleadings, framed the following issues:

(1) Whether the suit as framed is not maintainable?

(2) Whether the plaintiff-society has ceased to exist and the suit is not maintainable?

(3) Whether the main building was constructed without Government funds?

(4) Whether the additional blocks were constructed with 10 per cent. contribution of the plaintiff-society?

(5) Whether the land was assigned and not alienated and whether the Government is not entitled to take it over?

(6) Whether the taking over of the hostel by the Government is valid?

(7) Whether the plaintiff is entitled for possession of the plaint building?

(8) Whether the value of the building given in the plaint is correct?

(9) To what relief is the plaintiff entitled?

and held that the society did not become defunct as alleged by the defendant and the suit was maintainable and that the land was alienated to the plaintiff subject to certain conditions and terms and that the Government is entitled to take over the land subject to those conditions only, and after analysing the documentary evidence he was of the view that all the buildings constructed on the property are the properties of the plaintiff and as private property cannot be taken over by the Government unless with the aid of law, the taking over of the plaintiff's properties was illegal and relied on the decision of Srinivasan, J. in *R. Vaidyalingam* v. *The Collector of Tiruchirapalli and another*[1]. The learned Judge was emphatic that the entire suit properties were private properties and that, therefore, it cannot be taken over by the Government without paying compensation. He harped upon the text of clause 8 of Exhibit A-2 and was of the view that as that clause also does not contemplate resumption of land and buildings without praying compensation, the act of the Government in having unilaterally taken over the properties, both movable and immovable of the hostel, is against law. He would not agree that even though the State Government laid down a policy to take over the management of subsidised hostels for ensuring better management and better benefit to the students belonging to the depressed classes, that cannot

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1. W.P. Nos. 821 and 822 of 1963.

entitle the State Government to deprive citizens of private property and, in that context, upheld the contention of the plaintiff. He went further into the question as to whether the main building was constructed without Government funds and held that the main building was not constructed without the aid of the Government funds. On issue 4, whether the additional blocks were constructed with 10 per cent. contribution of the plaintiff-society, he held that the additional buildings were put up with the 10 per cent contribution made by the plaintiff and answered the issue accordingly. On the question whether the valuation of the building as given by the plaintiff was correct, the Court agreed with it, as no contrary material was placed before it to evaluate the building. He found issues 1, 2 and 5 to 7 in favour of the plaintiff and decreed the suit for possession with costs. It is as against this the present appeal has been filed. In the grounds of appeal *inter alia* the State Government referred to their power under Exhibit A-2 to resume the lands alienated by them either wholly or in part and that the said conditions can be invoked by paying the value of the building, if any, put up by the assignee. Before us, it is contended that as such grants and assignments are made under the Government Grants Act and as no law, the tenor of which would be contrary to or repugnant to the context of assumption or alienation, can have any effect provided the grant was under the Government Grants Act, the argument is that clause 8 of the grant under consideration (Exhibit A-2) entitles them to resume the land for public purposes and irrespective of the absence of mal-administration by the management of the hostel in the instant case, the exercise of their power under clause 8 of Exhibit A-2 is proper and unquestionable. After citing certain authorities in support of the proposition that a public purpose is a matter which has to be decided subjectively by the Government which is the authority to decide as to whether one purpose is a public purpose or not, the learned Additional Government Pleader would say that when power was exercised under clause 8 of Exhibit A-2 to take over the hostel in question belonging to the plaintiff together with its buildings, the intention was to take over the hostel pursuant to the accredited policy of the Government and in order to improve the economic conditions of the inmates of such hostel. The learned counsel for the respondent-plaintiff, however, would say that in the absence of any indication or reference in Exhibits B-14, B-10 and B-15 that the hostel was to be taken over in the purported exercise of the power under Exhibit A-2 and as the captions in the exhibits only refer to the positive fact that the Government wants to take over the hostels and the buildings, there has not been a proper exercise of power and, therefore, the taking over of the hostel properties is bad. It is also made out that when D.W. 1 was examined on the side of the defendant, he did not even whisper that the taking over of the hostel premises was pursuant to a public purpose and such reference to a public purpose in the written statement would not make any difference at all. Further, the argument proceeds that as no power to appropriate property of a private citizen can be put into motion without a proper notice to that citizen and without the proper provision of law being invoked, the clause 8 of Exhibit A-2 cannot vest in the Government the power to unilaterally act and take over the hostel and the building without even making an offer to compensate the plaintiff-society for such action on the part of the State which resulted in at least a part of private citizen's property being deprived of and taken over without compensation. Reliance is again placed upon the decision of Srinivasan, J., referred to above.

4. The main question that arises for consideration in this case is whether the Government acted properly and in accordance with law when it took over the plaintiff's buildings and the hostel pursuant to the accredited policy of its to take over the hostels in the State to run it departmentally and on better and sound measures. For this purpose, it is necessary to go into the question of the terms of the grant by which the society was given possession of government land.

of the extent of 39 cents. It is not in dispute that this alienation was under the State Grants Act. One of the conditions of alienation which is relevant for the purpose may be extracted:

> "The Government may resume the land wholly or in part with any buildings thereon if in the opinion of the Government the land is required for a public purpose, or for conducting mining operations. In the event of such resumption or in the event of the acquisition of the land for any reasons the compensation payable for the land and the trees should in no case exceed the amount paid for by them by the grantee at the time of alienation or vestiture or their value at the time of resumption or acquisition whichever may be less together with the initial cost of the value at the time of resumption, whichever may be less or any buildings erected or other improvement effected on the land by the grantee in accordance with the terms of the grant. The amount of any grant made by the Government towards the cost of the building or other improvements shall be deducted from the compensation payable under the condition."

The Government, if it is of the view that the alienated land is required for a public purpose, can resume the land either wholly or in part with any buildings thereon. The clause, however, is silent about the payment of compensation to be made to the grantee at or about the time of resumption. The later portion of clause 8, however, refers to such payment of compensation, but it does not make it obligatory on the part of the State Government to offer and pay such compensation payable to the citizen at or about the time when it resumes the land wholly or in part with the buildings thereon. The primary condition to be satisfied before the exercise of power under clause 8 appears to be that there should be a public purpose which should prompt the State Government to act and secondly it should resume the alienated land together with the buildings thereon. There is, however, in clause 8 itself an indication as to how the compensation has to be arrived at in cases where the grantees put up their own constructions or improve the property after the grant was made. If, therefore, there is such a power in clause 8 of the grant which would entitle the State Government to resume the land or acquire it under certain circumstances but only to subserve a public purpose, then the question is whether such power has been exercised properly in this case. Mr. Ratna Mudaliar, the learned counsel for the respondent would say that as the society was running the hostel for a public purpose, the necessity for exercise of such power contemplated under clause 8 has not arisen, for the public purpose openly proclaimed by the State Government as the purpose for which the hostel is being taken over, is to run it again as a hostel for the depressed classes. As one public purpose substitutes another public purpose, the argument is that the State Government did not have the requisite authority to act.

5. The above argument fails to take into consideration the essential ingredients in clause 8 of Exhibit A-2. Whenever the State Government entertains subjectively an opinion that a particular property which it granted earlier under the Government Grants Act to a citizen is required for a public purpose of its own choice, then in our view it would not matter if the public purpose for which such resumption is thought of is similar to or parallel to the public purpose for which the property is being used or utilised. If the subjective satisfaction of the State in the matter of deciding whether a particular property is needed for a public purpose is not normally justiciable, then it would be difficult for us to embark upon an investigation or enquiry into the propriety of such a public purpose. The only question that has to be looked into is whether the power is being exercised for a public purpose and if the public purpose put in the forefront is undoubtedly a public purpose and is in the public interest, then other considerations and comparative hardships would not come into the picture as it would be beyond the pale of investigation and enquiry. A similar question came up before the Supreme Court when it was considering

the acquisition of private property under the provisions of the Land Acquisition Act. In *Abdul Hussain* v. *State of Gujarat*[1]. the contention that when a particular land is being already used for one public purpose, the legislature could not have intended to empower the Government to destroy that purpose and substitute in its place another public purpose was not accepted by the Court. In *R. L. Arora* v. *State of Uttar Pradesh*[2], the relevant facts may be stated before appreciating the ratio laid down by the Supreme Court. It was alleged that the petitioner therein was a businessman and was intending to use the land for erecting a factory......... It was also alleged that it could not be the purpose of the Act that land which was intended to be used for one public purpose should be acquired for another public purpose. While dealing with such facts and contentions, the Supreme Court said "the intention of the previous owner whatever it may be does not in our opinion enter into question at all, so far as the validity of the acquisition is concerned provided the acquisition is for a public purpose.........Once the Government decides that the acquisition is needed for a public purpose, the subsequent action cannot be challenged on the ground that the previous owner himself intended to use the land for some public purpose."

6. It is, therefore, seen that what is primarily required to judge whether the resumption of land under clause 8 of Exhibit A-2 is for a public purpose is to test whether the Government has subjectively decided to resume the land and that too for a public purpose which is unmistakable by the invocation of common sense. We, are, therefore, unable to agree with the learned counsel for the respondent that as the power for which the State was resuming the land is more or less similar to the one to which the land and the buildings in the hostel are being put up, there is no occasion or necessity for the exercise of such power. The other contention of the learned counsel for the respondent is that Exhibits B-14, B-10 and B-15 do not refer to the proceedings under which the power is sought to be exercised. But they only threaten the plaintiff that the buildings and the land would be taken possession of on a particular day and that the society should hand over clean physical possession of such properties. Exhibits B-4, B-10 etc., are only means to an end. They refer to a process deployed by the State in exercise of power. The fact that the relevant provision under which the power has been exercised has not been stated in the various forms and processes mentioned by the State to achieve their objective would not defeat the very purpose for which such steps were undertaken. We are only concerned with one aspect, namely, whether the State had the requisite authority under any known provision of law to take over the hostel buildings. If such power could be traced to an indefeasible provision, may be under a State grant or may be under any provision of statute, then the absence of any reference to it in the correspondence which ensued between the State and the grantee would not belie or belittle the exercise of such power which is admittedly vested in the State. We are, therefore, not agreeing with the contention of Mr. Ramachandran that the absence of any reference to clause 8 in Exhibit A-2, in Exhibit B-14 or Exhibit B-10 would disentitle the Government from resuming the land.

7. Nextly, he referred to the testimony of D.W. 1. He would say that he did not refer to the expression 'public purpose' in his testimony. But, unfortunately, the cross-examination also is equally bald and uninstructive. There is not even a suggestion therein that the Government was acting without power. The counsel, therefore, cannot take advantage of the non-mention of the source of power under which the State acted when it is common ground that the State could exercise such power only under clause 8 of Exhibit A-2 which

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1. (1968) 2 S.C.J. 425 : (1968) 1 S.C.R. 597 : A.I.R. 1968 S.C. 432.

2. (1964) 2 S.C.J. 652 : (1964) 2 M.L.J. (S.C.) 148 : (1964) 2 An.W.R. (S.C.) 148 : (1964) 2 Comp.L.J. 309 : (1964) 6 S.C.R. 784 : 34 Comp. Cases 487 : A.I.R. 1964 S.C. 1230.

in turn was a grant under the State Grants Act and which grant prevails over all the provisions which are inconsistent with the provisions of the grant. To make this part of the discussion complete, we may refer to section 3 of the Government Grants Act which makes such grants to take effect according to their tenor. This section says that "all provisions, restrictions, conditions and limitations over contained in any such grant or transfer shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the legislature to the contrary notwithstanding". This argument of the learned counsel for the respondent, therefore, fails.

8. Strong reliance was placed upon the decision of Srinivasan, J. in *R. Vaidyalingam v. The Collector of Tiruchirapalli and another*[1]. From a fair reading of the judgment of my learned brother, the facts therein are entirely different. The hostel was started at Lalgudi, no doubt, over a plot of land allotted by the Government for the building of a hostel. A building was also put up with the aid and assistance of Government funds. In order to secure the performance of a condition that the society should refund to the Government a proportionate amount of the grant, the society was executing a mortgage deed in favour of the Government. This presupposes that the entire property which was later resumed by the Government was the property belonging to a private citizen. In those circumstances, Srinivasan, J., held that as no private property could be acquired without the invocation of the law relating to it, such a taking over of the hostel premises was without authority. But in the instant case, the facts are different. It is nowhere claimed that the entire building or the land over which the building stood or the hostel campus of the plaintiff-society was the private property as it is normally understood. That property was a subject-matter of a Government grant which was subject to the special covenants and restrictions governing such grant. We have also referred to clause 8 of the said grant. It empowered the State Government to resume the land for a public purpose. It is for a public purpose that the lands and buildings were resumed. Therefore, the question of approaching private property without authority of law does not arise in this case.

9. For all these reasons, therefore, we do not agree with the learned Subordinate Judge that there has been an abuse of power on the part of the State when the hostel properties were resumed.

10. The only surviving question for decision is as to the manner in which the plaintiff has to be compensated for the properties of his which were taken over by the Government without an offer for compensation at the time when they were taken over or at any time thereafter. It is fundamental that if composite property consisting of private property and property subject to a Government grant, is taken over under some process of law, simultaneously it is but necessary that the private citizen should be compensated for that part of the property to which he contributed without reference to the Government funds. The learned Additional Government Pleader in the course of his argument fairly conceded that the Government is prepared to give compensation for such constructions and improvements and for such movable properties of the plaintiff-society which were taken over by them in 1959. The learned Judge, in his judgment, while referring to the general principles as to the payment of compensation and after evaluating the property on the basis of the materials before him, made no reference to it, but decreed the suit as prayed for. It is unfortunate that the plaintiff did not seek for an alternative prayer. But, that would not prevent us from granting the relevant relief to which the plaintiff would be entitled. Though it is claimed that the entire buildings and the movables therein do belong to the Government, the learned Judge, after examining the material before him, came to the conclusion that certain additions and improvements were carried on to the existing building built partly at Government cost and that the main building was also constructed by the management of the hostel with Government aid. We are not inclined

1. W.P. Nos. 821 and 822 of 1963.

to disturb such finding of fact rendered by the Court below. While accepting the findings of the learned Subordinate Judge in the matter of the value of immovable properties as also the additions made from time to time, we remit the subject-matter of this appeal in so far as it relates to the payment of compensation by the defendant to the plaintiff and direct the learned Subordinate Judge to enquire into the following questions.

(1) What are the improvements done by the plaintiff to the property without reference to the Government funds or their aid?

(2) What were the immovable properties which were taken over by the Government when it took over the hostel premises pursuant to Exhibits B-14, B-10 and B-15?

(3) What would be the value of such additions and improvements done by the plaintiff and what would be the value of the movables belonging to the plaintiff at the time when the hostel was taken over by the Government?

(4) What, if any, was the contribution made by the plaintiff when the first and the additional buildings were put up and what would be the amount of compensation, if any, to which the plaintiff would be entitled to?

and after answering the above questions, pass a decree in terms of money directing the defendant to pay such compensation amount together with interest at 6 per cent per annum from the date when the hostel was taken over, till date of payment. For this purpose, the plaintiff should be directed to pay additional Court-fee on the payment of which only he would be entitled to a decree. If the lower Court is of the view that additional pleading may be necessary for a decision on the above questions, he may give an opportunity to both the plaintiff and the defendant to file such pleadings. The parties may also be given liberty to adduce oral evidence in support of their respective case. The appeal is allowed in part and for a proper adjudication of matters and for the grant of the relevant relief to the plaintiff, the suit is remitted to the lower court for a fresh trial. There will be no order as to costs throughout. The Court-fee payable in the trial Court shall be borne by the defendant.

R.S. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*G. Ramanujam, J.*

R. Gopal Rao .. *Petitioner**

v.

The Commissioner of Income-tax, Madras-II, 22, Nungambakkam High Road, Madras-34 .. *Respondent.*

Central Civil Services (Classification, Control and Appeal) Rules, (1957), rule 13 (iv) to (vii)—Government servant—Disciplinary action—Reduction in rank from Class III to Class IV—Whether correct—"Reduction" meaning of—Difference between reduction and revision.

The expression "reduction in rank" covered a wider field than reduction to a lower post. It is true, the word "revision" always connotes a return to the original post or place. But, the word "reduction" has no such limitation and, therefore, reduction in rank extends even to a rank which the officer concerned never held. Where a statutory provision uses two different expressions, the normal rule of interpretation is that they cannot be deemed to have been used synonymously. Rule 13 of the Central Civil Services Rules as it stands, enables the disciplinary authority to impose a penalty of reduction in rank not only to a lower post which the concerned civil servant held earlier but even to a lower post which he did not hold at any point of time. [*Para.* 14.]

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavits filed therewith, the High Court will be pleased to issue a writ of *certiorari*

* W.P. Nos. 2079 of 1972 and 3749 of 1973. *17th February*, 1976.

(1) calling for the entire records pertaining to the disciplinary proceeding initiated against the petitioner by the respondent by his Memorandum Conf. No. 23/63/2004 dated 22nd December, 1964 under rule 12 (4) of the Central Civil Services (Classification, Control and Appeal) Rules, 1957 now resting with the petitioner's representation dated 2nd July, 1971 and quash the entire proceeding (W.P. No. 2079 of 1972).

(2) Calling for the records pertaining to the order under rule 15 (4) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 in proceedings of the Commissioner of Income-tax, Madras II, Madras Conf. No. 23/63/Vol. III, dated 26th October, 1972 and quash the said order. (W.P. No. 3749 of 1973).

U. N. R. Rao, for Petitioner.

A. N. Rangaswamy, Standing Counsel for Income-tax, for Respondent.

The Court made the following

ORDER.—The petitioner in both the writ petitions is one and the same person.

2. In the first writ petition he has challenged the validity of the memorandum, dated 22nd December, 1964, issued by the Commissioner of Income-tax, the respondent herein, calling upon him to show cause against the proposed punishment of compulsory retirement under rule 15 (4) of the Central Civil Services (Classification, Control and Appeal) Rules, 1957 within fifteen days from the date of the receipt of that memo. In the second writ petition, the petitioner has challenged the validity of the final order passed by the Commissioner of Income-tax, the respondent herein, dated 26th October, 1972 reducing the petitioner from Class III to Class IV, and directing that the petitioner will not be eligible for promotion to any higher posts for a period of three years.

3. As both the writ petitions arise out of the same disciplinary proceedings initiated against the petitioner and as the issues involved are practically the same, it is convenient to dispose of them together.

4. The petitioner was appointed as officiating lower division clerk in the Income-tax Department by an order dated 15th January, 1947 of the Inspecting Assistant Commissioner of Income-tax, Central Range, Madras. He joined duty on 8th February, 1947. Later, he was appointed as officiating steno-typist on and from 11th January, 1950 by an order dated 9th January, 1950 by the then Inspecting Assistant Commissioner, Central Range. He was confirmed as lower division clerk with effect from 1st October, 1951 by an order dated 28th December, 1951 of the Commissioner of Income-tax, Madras. Later, he was confirmed as a steno-typist with effect from 1st October, 1951 by an order dated 27th December, 1956 of the Commissioner of Income-tax. Subsequently, the petitioner was promoted as officiating upper division clerk by the Commissioner's proceedings, dated 19th September, 1957 and was posted to Income-tax Office, Salem. The petitioner joined the Income-tax Office, Salem on 25th November, 1957. In May, 1959, he was transferred from Salem to Ooty; but he did not join duty at Ooty and went on applying for leave on one ground or other. He made representations against his transfer to Ooty from Salem and those representations were rejected by the Commissioner of Income-tax, Madras, Kerala and Coimbatore and also by the Central Board of Revenue, New Delhi. Since the petitioner did not join duty at Ooty and went on applying for leave for a long period, his leave was refused. Even then, he failed to report for duty at Ooty. Thereafter, the Inspecting Assistant Commissioner, Coimbatore initiated disciplinary proceedings against the petitioner for wilfully absenting himself from duty and after due enquiry, a show cause notice was issued to the petitioner on 5th April, 1960 proposing to revert him as a steno-typist for a period of one year and to treat the period of his absence without leave as extraordinary leave. After receiving the said show cause notice, the petitioner reported for duty on 4th April, 1960 at the Income-tax Office, Ooty. He was however informed by the Inspecting Assistant Commissioner, Coimbatore that the question of permitting

him to join duty will arise only after the period of his absence is regularised in the disciplinary proceedings. Thereafter, the petitioner submitted his representation on 8th April, 1960 to the show cause notice issued to him. The Inspecting Assistant Commissioner, Coimbatore, however reverted him to the substantive post of steno-typist and posted the petitioner to the Income-tax Office, Ooty. The petitioner filed an appeal against the order of reversion and the said appeal was rejected by the Commissioner of Income-tax, Madras.

5. Subsequently, disciplinary proceedings were initiated against the petitioner by the Inspecting Assistant Commissioner, Coimbatore for various irregularities in his work and charges were framed at various stages and ultimately the petitioner was compulsorily retired from service by the order of the Inspecting Assistant Commissioner, dated 31st March, 1962. The petitioner's appeal to the Commissioner of Income-tax against those disciplinary proceedings was rejected. The petitioner, thereafter, filed Writ Petition No. 201 of 1963 challenging the said order of compulsory retirement dated 31st March, 1962. The said writ petition was allowed on 6th August, 1964 without going into the merits, on a technical ground that the Inspecting Assistant Commissioner, Coimbatore was not the competent authority for imposing a major penalty such as compulsory retirement, as the petitioner had been confirmed in the category of steno-typist by the Commissioner. The Income-tax Department questioned the said order in the writ petition in writ appeal No. 44 of 1965.

6. Without prejudice to the stand taken in the said writ appeal the Commissioner of Income-tax, Madras, initiated fresh enquiry proceedings against the petitioner on the same charges on which the punishment of compulsory retirement was originally imposed on him, and the petitioner was directed to continue to be under suspension until further orders. On 6th May, 1965, the Commissioner framed the following three charges against the petitioner:—

"*Charge I*: That the said Shri R. Gopal Rao while functioning as steno-typist, Income-tax Office, Ootacamund, during the petiod of April and May, 1961, addressed the Commissioner of Income-tax, Madras, personally in his letter dated 29th April, 1961 though the contents of the letter were purely official and also couched the letter in offensive and objectionable language and thereby committed acts of indiscipline and insubordination.

Charge II: That during the above period and while functioning in the aforesaid office, the said Shri R. Gopal Rao refused to go to the Income-tax Officer's room when called to do so.

Charge III: That during the above period and while functioning in the aforesaid office, the said Shri Gopal Rao refused to take delivery of official communications intended for him, and thereby committed acts of indiscipline and insubordination."

7. The said charges were communicated to the petitioner asking him to submit his representations before 15th June, 1965. The petitioner returned the memo of charges with certain endorsements but he neither admitted nor denied the charges. It was, therefore, decided to hold an enquiry and the Appellate Assistant Commissioner, Coimbatore, was appointed as Inquiry Officer. The Inquiry Officer took up the matter for enquiry and issued a notice to the petitioner on 17th February, 1966 calling upon him to appear for the enquiry. The petitioner did not appear on the due date for the enquiry or in later dates when the matter stood adjourned. Ultimately, the Inquiry Officer proceeded with the enquiry *ex parte* on the basis of the materials placed before him and he submitted his report to the Commissioner of Income-tax, the Disciplinary Authority, who, after a consideration of the report of the Inquiry Officer, came to the provisional conclusion that the petitioner should compulsorily retire from service. The said provisional decision was communicated to the petitioner by a show cause notice dated 27th February, 1970 which was served on the petitioner on 2nd March, 1970. The petitioner, at that stage filed two writ petitions

viz., W.P. No. 710 of 1970 and W.P. No. 711 of 1970, one for quashing the show cause notice dated 27th February, 1970 and the other to restore him to the post of upper division clerk with effect from 13th October, 1959 in pursuance of an earlier order in Writ Petition No. 201 of 1963. The said two writ petitions, however, were dismissed on 17th March, 1970 even at the admission stage. Thereafter, the petitioner on 30th March, 1970 addressed the Disciplinary Authority enclosing a doctor's certificate dated 29th March, 1970 for four months time for filing his objections to show cause notice; but he was informed that the time could be granted only upto 30th April, 1970 and not any further. To this the petitioner by his letter dated 29th April, 1970 replied that he has filed two appeals *viz.*, Writ Appeal No. 292 of 1970 and 293 of 1970 against the orders in the Writ Petition Nos. 710 of 1970 and 711 of 1970 and that till the disposal of the said two appeals, he was unable to file his reply to the show cause notice. He also filed a Civil Miscellaneous Petition requesting the Court to stay the disciplinary proceedings which was, however, dismissed on 14th December, 1970. The Commissioner of Income-tax to be fair, issued another memo dated 22nd December, 1970 requiring the petitioner to show cause against the proposed penalty of compulsory retirement within fifteen days from the date of receipt of that notice. However, the petitioner continued to be reluctant to file his reply to the said show cause notice. Ultimately, the writ appeals filed by the petitioner were dismissed on 22nd April, 1971 and on the same day, a memo was again issued to the petitioner by the Commissioner to file his representations if any, within a week from the date of its receipt. The petitioner, after giving various excuses ultimately submitted his written representations on 2nd July, 1971 and 3rd July, 1971. After considering the said representations, the Commissioner passed final orders on 26th October, 1972. In the present two writ petitions, the petitioner challenges the validity of the show cause notice dated 22nd December, 1964 issued by the Commissioner and also the final order dated 26th October, 1972 passed by the Commissioner, in the disciplinary proceedings initiated against the petitioner.

8. The petitioner has not questioned, in these writ petitions the procedure followed by the Commissioner in conducting the disciplinary enquiry. He has not even suggested that there was any defect in the enquiry conducted by the respondent or that the finding of the Inquiry Officer, which has been accepted by the disciplinary authority is not based on any material. The Court, has, therefore, to proceed taking it that the disciplinary enquiry conducted against the petitioner was proper and that the finding, on the basis of which the punishment has been meted out, was based on proper and relevant materials.

9. From the contentions raised by the petitioner in both the writ petitions it is seen that they are four in number:—

(1) That the Commissioner is not entitled to act as a disciplinary authority under Rule 12 (4) and that the disciplinary authority which held the enquiry at the earlier stage is alone competent to conduct the enquiry.

(2) The charges which were enquired into by the Commissioner are based on the same allegations which were the subject-matter of the disciplinary enquiry at an earlier stage as a result of which the petitioner was reverted from the post of upper division clerk to his substantive post of steno-typist and therefore, the punishment now meted out in respect of the same allegations will amount to a double punishment.

(3) The ultimate charges framed by the Commissioner, which proceeded on the basis that the petitioner is a steno-typist while he is not are invalid and therefore any enquiry into the said charges is equally invalid and illegal; and

(4) in any event, the reduction in rank from Class III to Class IV is illegal in that he is asked to serve in a lower post which he never held before.

10. As regards the first of the said four contentions, it is submitted by the learned counsel for the petitioner that

since the earlier disciplinary proceedings initiated by the Inspecting Assistant Commissioner have been quashed, rule 12 (4) of the Central Civil Services (Classification, Control and Appeal) Rules, 1957, can be invoked only by the said Inspecting Assistant Commissioner for initiation of fresh disciplinary proceedings against the petitioner which will have the effect of suspending the petitioner from the date of the original order of punishment. Rule 12 (4) of the Central Civil Services (Classification, Control and Appeal) Rules, 1957 is as follows:—

> "(4) Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Government servant is set aside or declared or rendered void in consequence of or by a decision of a Court of law and the disciplinary authority, on a consideration of the circumstances of the case, decides to hold a further inquiry against him on the allegations on which the penalty of dismissal, removal or compulsory retirement was originally imposed, the Government servant shall be deemed to have been placed under suspension by the Appointing Authority from the date of the original order of dismissal, removal or compulsory retirement and shall continue to remain under suspension until further order."

According to the learned counsel for the petitioner, the disciplinary authority who decides to hold a further enquiry against the petitioner on the allegations on which the penalty of compulsory retirement was originally imposed should be the same authority, and the Commissioner's decision to hold further enquiry in this case, is therefore, without jurisdiction and will not attract the deeming provision contained in the second limb of the said rule to treat the petitioner as under suspension from the date of the original order of punishment. I am not able to agree with the learned counsel for the petitioner in this regard. Admittedly, the original order of punishment imposed by the Inspecting Assistant Commissioner has been set aside by this Court on the ground that the Inspecting Assistant Commissioner is not the disciplinary authority and therefore the order of punishment is without jurisdiction with the observation that fresh proceedings have to be initiated by the disciplinary authority who is competent to initiate the disciplinary proceedings under the rules against the petitioner. It is not in dispute that the Commissioner of Income-tax is the competent authority to initiate the disciplinary proceedings and impose punishment on the petitioner. The said rule does not say that the authority who initiated disciplinary proceedings earlier should alone initiate fresh proceedings. The rule uses the word "disciplinary authority" which means an authority competent to initiate disciplinary proceedings. Under the rules, there can be only one disciplinary authority and the disciplinary proceedings initiated by an authority who is not competent to do so is a nullity and therefore, the fresh proceedings can be taken only by the disciplinary authority contemplated by the rules. The interpretation sought to be placed by the learned counsel for the petitioner on the said rule, if accepted, will make the rule purposeless and will result in an unintended immunity to a Government servant in respect of charges for which he was punished, but the punishment has been later set aside on the ground that it has been imposed by a person who is not a disciplinary authority. The above rule consists of two parts *viz.*, (i) a decision by the disciplinary authority to continue the proceedings and (ii) once such a decision is taken, the Government servant shall be deemed to have been placed under suspension by the Appointing Authority from the date of the original order of dismissal, removal or compulsory retirement and shall continue to remain under suspension until further orders. In my view, it is impossible to say that rule 12 (4) contemplates that an authority who was found to be incompetent to initiate proceedings and to have no jurisdiction to initiate proceedings, should again initiate fresh proceedings under that rule.

11. A similar contention appears to have been put forward by the petitioner in *R. Gopal Rao* v. *The Commissioner of*

Income-tax, Madras-2[1] filed by him earlier, and Ismail, J. has rejected the said contention with the following observations:

"If that order was passed by a competent authority the question of that order being set aside cannot possibly arise. It is only because that order was passed by an authority not competent to do so the question of that order being set aside arose and therefore the contention of the learned counsel for the petitioner has no substance whatever in this behalf. As a matter of fact the rule creates a fiction, namely, that the Government servant shall be deemed to have been placed under suspension by the appointing authority, and it is no answer to that fiction to say that the original order of compulsory retirement was not passed by the appointing authority but by some other authority. Therefore, there is no substance in this contention of the learned counsel for the petitioner."

As against the dismissal of W.P. Nos. 770 and 711 of 1970, the petitioner filed W.A. Nos. 292 and 293 of 1970 which were also dismissed on merits on 20th April, 1971. I do not, therefore, see any merit in the first contention of the petitioner.

12. The second contention of the learned counsel for the petitioner is also equally without any substance. The petitioner has not established his case that the order of reversion was by way of punishment. The department's stand all along upto the date of the passing of the impugned order was that the order of reversion was for administrative reasons and that it is not by way of punishment. When the petitioner specifically challenged in *R. Gopal Rao* v. *The Inspecting Assistant Commissioner and another*[2], the order of reversion dated 23rd April, 1960 from the post of upper division clerk to his substantive post of steno-typist on the ground that it offended rule 14 (4) (*a*) of the Central Civil Services (Classification, Control and Appeal) Rules, 1957, Veeraswami, J. as he then was, held at follows:—

"Actually the order of reversion gave no reason why the petitioner was reverted to his substantive post of a steno-typist. Apparently what operated in the mind of the Inspecting Assistant Commissioner of Income-tax, who passed the order was the background of the facts relating to the charges and disciplinary proceedings against the petitioner. It may be remembered that at the time of his reversion, the petitioner was only acting in the post of upper division clerk. It is possible that those facts furnished the motive and the Inspecting Assistant Commissioner of Income-tax considered that the petitioner should be reverted to his permanent post but not by way of punishment, which he had the power to do. In my view, no interference with this order is called for".

On appeal, the said view has been affirmed in *The Inspecting Assistant Commissioner of Income-tax and another* v. *R. Gopal Rao*[1], with the following observations:—

"The learned counsel for the respondent has referred to the order of reversion passed earlier in 1960 from the post of upper division clerk to that of steno-typist. This order was also challenged in the writ petition. But it was held to be a valid order. There is no appeal against that part of the order of the learned Judge by the respondent. If he wanted to challenge that finding, he ought to have taken appropriate steps. Our decision in this appeal relates only to the order compulsorily retiring the respondent from the post of steno-typist. We are not interfering with the order of the learned Judge holding that the reversion from the post of upper division clerk to that of steno-typist cannot be interfered with."

It is, therefore, no longer open to the petitioner to raise the contention that the order of reversion was by way of punishment. Perhaps, the petitioner was embol-

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1. W.P. Nos. 710 and 711 of 1970.
2. W.P. No. 201 of 1963.

1. W.A. No. 44 of 1965.

dened to raise this contention once again in the Writ Petition No. 3749 of 1973 in view of the fact that impugned order casually mentions while stating the facts, that the order of reversion was by way of punishment. It is true that in the impugned order in paragraph 4, it is stated that there was show cause notice proposing to impose punishment by way of reversion. But in the counter affidavit filed by the respondent, it has been stated in paragraph 6 that the order of reversion dated 23rd April, 1960 reverting from his officiating post of upper division clerk to his substantive post as steno-typist was in fact an administrative reversion and not a punishment, that the reference in the narrative portion of the impugned order that the said reversion was a punishment was a mistake and that the said unfortunate mistake is regretted. The relevant file has been produced by the respondent in support of its stand to show that the reference to the order of reversion as a punishment in the impugned order is a manifest mistake and that the order of reversion is, in fact, an administrative one. I have perused the relevant file and it shows that the petitioner has been reverted to his substantive post as there was no vacancy in the post of upper division clerk in which he was officiating before he went on leave. The said file was also perused by the learned counsel for the petitioner and he had no comments to make on the entries contained in the file to the effect that the petitioner was reverted to his substantive post for want of vacancy in the post of upper division clerk. I have, therefore, to accept the explanation of the respondent in the counter-affidavit for the incorrect narration of facts in the impugned order. I am, therefore, of the view that the mistaken description by the respondent of the earlier reversion as one of punishment does not affect the validity of the impugned order. Even otherwise the impugned order reducing the petitioner to Class IV is based on the enquiry conducted in relation to different charges and not on the same charges which had been levelled against the petitioner earlier to the order of reversion. Even if the order of reversion dated 23rd April, 1960 is held to be by way of punishment, that will not prevent the disciplinary authority from punishing him in relation to other charges which were not the subject-matter of the earlier enquiry. Therefore, in any case, the punishment of reduction in rank imposed in the impugned order cannot be said to amount to a second punishment in relation to the same charges. I see no merit in this contention also.

13. The third contention advanced by the petitioner is that the charges have been framed against the petitioner on the basis that he is a steno-typist while he is not, and therefore neither the charges nor the punishment imposed therefor can be valid. It is not in dispute that the substantive post held by the petitioner was steno-typist. By an order of reversion dated 23rd April, 1960 the petitioner was reverted from his officiating post of upper division clerk to his substantive post of steno-typist and therefore, on the date when the fresh charges came to be framed against the petitioner by the competent disciplinary authority, the petitioner was only a steno-typist. The charges or the punishment against the petitioner therefore cannot be said to be vitiated for the reason alleged by the petitioner. Even assuming that there is a wrong description of the petitioner as a steno-typist, that will not affect either the validity of the proceedings or the punishment imposed therefor by the disciplinary authority if they are otherwise valid under the rules. I do not, therefore see any merit in the above contention.

14. As regards the fourth contention the learned counsel for the petitioner submits that the petitioner was recruited only as a member of Class III services and that therefore he cannot be reverted to Class IV of which he was never a member. According to the learned counsel for the petitioner, the reduction can only be to a post which the petitioner held earlier at any point of time; but he cannot be reverted to a post which he never held at any time before in Class IV which is menial service. In effect, what the learned counsel says is that there is no difference betwen the order of reversion and an order of reduction in rank, that it is well established that

reversion can be only to a post which a person held earlier and that reduction also can only be to a post or class of service which the person occupied at any time beforvie. Though this contention appeared at the first blush somewhat attractive; I do not find any support for the same from any rulings and the learned counsel was unable to cite any authority in support of his plea that an order of reduction should be equated to an order of reversion. Though the word "reduction" in rank is comprehensive enough to include a reversion to a lower post, it cannot be taken to be synonymous. Reduction cannot always be equated to reversion. Reversion to a lower post is one form of reduction in rank. In my view, the expression "reduction in rank" covers a wider field than reversion to a lower post. It is true, the word "reversion" always connotes "a return to the original post or place". But, the word "reduction" has no such limitation and therefore, reduction in rank extends even to a rank which the officer concerned never held. The word "reduction" normally connotes, the "state of being reduced, diminution, subjugation". Article 311 of the Constitution of India dealing with the major punishments refers to a dismissal, removal or reduction in rank. Rule 13 (*iv*) to (*vii*) of the Central Civil Services (Classifications, Control and Appeal) Rules, 1957 with which we are concerned refer to the following major punishments.

> "13. (iv) reduction to a lower service, grade, or post, or to a lower time-scale, or to a lower stage in a time-scale;
>
> (v) compulsory retirement;
>
> (vi) removal from service which shall not be a disqualification for future employment;
>
> (vii) dismissal from service which shall ordinarily be a disqualification for future employment."

The expression "reduction to a lower service, grade or post," cannot be equated in my view to the expression "reversion to a lower service cadre or post" as contended for by the petitioner. I am not able to agree with the contention of the learned counsel for the petitioner that the word "reduction" has been used in the sense of reversion. On the other hand, there is an indication that the word "reduction" has not been used in the restricted sense. In the latter part of the said rule 13, the word "reversion" has been specifically used vide ***Explanation*** (iv) and (v) to the said rule 13. Where a statutory provision uses two different expressions the normal rule of interpretation is that they cannot be deemed to have been used synonymously, Rule 13, as it stands, in my view, enables the disciplinary authority to impose a penalty of reduction in rank not only to a lower post which the concerned civil servant held earlier but even to a lower post which he did not hold at any point of time. Therefore, the fourth contention of the petitioner also cannot be accepted.

15. Writ Petition No. 3749 of 1973 fails and is dismissed on merits.

16. W.P. No. 2079 of 1972 having been filed against the show cause notice, dated 22nd December, 1964, it has become infructuous in view of the fact that the final order imposing punishment has been passed on 26th October, 1972 which is the subject-matter in W.P. No. 3749 of 1973. Hence W.P. No. 2079 of 1972 is dismissed as infructuous.

17. In the result, both the writ petitions are dismissed. There will be no order as to costs.

S.J. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P.S. Kailasam, O.C.J.*

Sornathayammal .. *Petitioner**

v.

Veerana Thevar .. *Respondent.*

Tamil Nadu Cultivaing Tenants Arrears of Rent (Relief) Act (XXI of 1972), sections 5(1) (c), 7—Tamil Nadu Cultivating Tenants Protection Act (XXV of 1955), sections 3 (4), 4 (5)—Petition for eviction—Tenant in arrears of rent—Eviction ordered—Act XXI of 1972, coming into force—Petition under section 7 of the latter Act by tenant for restoration of possession—Petition allowed by Authorised Officer—Order invalid.

In an execution petition filec by a land-lord on 7th August, 1972, the Court ordered delivery of possession on 21st August, 1972. This was contrary to the statutory stay provided for under section 5 (1)(*c*) of Act XXI of 1972. Therefore the tenant filed a petition under section 7 of the latter Act for restoration of possession before the Authorised Officer (Land Reforms) and this was allowed. The landlord questioned this order in revision to the High Court,

Held: The benefit under section 4 (5) of being restored to possession is available to persons who have been dispossessed except under the provisions of section 3 (4). The order of eviction in this case was under section 3(4) of Act XXV of 1955; but dispossession was not in accordance with section 5 (1)(*c*) of Act XXI of 1972. It did not appear that the section contemplated cases of persons who would be dispossessed contrary to the provisions of section 5 (1) (*c*) of Act XXI of 1972. It was not possible to treat the order of eviction as *non est*, for in pursuance of the order, the landowner was put in possession and she was in fact in possession. There were no provisions in the Act which would enable the tenant to get back possession. It was not possible to accept the tenant's contention that section 4 (5) of Act XXV of 1955 would give him such a remedy. Unless such a remedy was specifically provided for in the enactment, the tenant could not have any remedy. [*Para.* 10.]

The finding that delivery of possession wa contrary to the statutory stay under section 5 (1) (*c*) of Act XX of 1972 would not bring the case under section 6-BB of Act XXV of 1955 and the power of revision could not be exercised by the High Court to direct delivery of possession by the land-owner. [*Para.* 11.]

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Authorised Officer (Land Reforms) Madras-2, dated 26th April, 1973 and made in T.C.T.P. No. 237 of 1972.

E. Damodaran for *K. Alagiriswami*, for Petitioner.

V. Krishnan, for Respondent.

The Court made the following

ORDER.—This petition is filed by the land-owner against the order of the Authorised Officer (Land Reforms), Madurai, in T.C. T.P. No. 237 of 1972, dated 26th April, 1973 allowing the petition by the tenant (respondent herein) under section 7 of the Tamil Nadu Act XXI of 1972 and directing restoration of possession by the landowner to the tenant.

2. The facts that are necessary for disposal of this revision petition are as follows : The tenant was cultivating 3.31 acres of wet lands belonging to the land-owner. Due to default in payment of rent the landowner filed a petition under section 3 (4) (*b*) of the Tamil Nadu Cultivating Tenants Protection Act of 1955 and an order of eviction was passed in T.C.T.P. No. 163 of 1970, dated 14th February, 1972. The tenant took the matter up to the High Court and the High Court in C.M.P. No. 3819 of 1972 pending C.R.P. No. 823 of 1972 ordered interim stay directing the tenant to deposit a sum of Rs. 5,000 into the trial Court within one month from 6th July, 1972. This deposit was not made within one month of 6th July, 1972 as directed. After the expiry of the period the landowner filed an eviction petition on 7th August, 1972, statint that the tenant has failed to comply with the directions of the High Court by pay-

* C.R.P. No. 1173 of 1973. 2nd April, 1976.

ing the amount. The civil revision petition itself was subsequently dismissed on 23rd February, 1973. On application by the landowner for eviction, notice was issued to the tenant for appearance on 21st August, 1972. Though the tenant acknowledged the notice, he did not appear for the hearing on 21st August, 1972. The Court in E.P. No. 13 of 1972 in T.C.T.P. No. 163 of 1970 dated 21st August, 1972 ordered the eviction of the tenant and possession was taken over by the landowner on 23rd August, 1972.

3. Act XXI of 1972 *i.e.*, Tamil Nadu Cultivating Tenants Arrears of Rent (Relief) Act, 1972 came into force on 11th August, 1972. It may be noted that this was four days after the landowner filed his eviction petition on 7th August, 1972. It is the plea of Mr. Krishnan, the learned counsel for the tenant (respondent herein) that the result of the provisions of the Tamil Nadu Act XXI of 1972 is that there is an absolute stay of proceedings for a period of six months from the date on which the Act came into force *i.e.*, from 11th August, 1972 and therefore the order of eviction passed and possession taken by the landowner on 23rd August, 1972 is *non est* and therefore the delivery of possession will have to be treated as a nullity.

4. In order to appreciate the contention, it is necessary to examine a few provisions of the Act XXI of 1972. Section 3 of the Act provides certain relief to the tenant on payment of arrears of rent. All arrears of rent payable by a cultivating tenant to the landlord and outstanding on the 30th June, 1971, shall be deemed to be discharged, whether or not a decree or order has been obtained therefor, if such cultivating tenant satisfies one of the conditions referred to in the section. We are concerned with clause (ii) which gives the benefit of the section if the cultivating tenant pays or deposits in the manner specified in clause (*b*) within six months from the date of the publication of this Act or under clause (iii) he is deemed to have paid or deposited under this Act. The effect of the section is that the arrears of rent outstanding on 30th June, 1971 would be deemed to have been discharged if the condition stipulated in this section is fulfilled. Now under clause (*b*) a cultivating tenant may either pay the current rent to the landlord, or deposit in the Court or before the competent authority to the account of the landlord, the current rent, or if the rent be payable in kind, its market value on the date of deposit. Clause (*c*) of section 3 prescribes the procedure for a tenant to make a deposit of the arrears of rent. When the arrears of rent is deposited the competent authority shall cause notice of the deposit to be issued to the landlord and determine the current arrears and direct the cultivating tenant to deposit any further sum as due within the period specified in clause (*a*) (ii). If the arrears of rent are paid as directed within the time referred to, the cultivating tenant shall be deemed to have paid the current rent for the purpose of this Act. So far as suits or proceedings pending on the date of the publication of the Act for recovery of arrears of rent or for eviction of the cultivating tenant for non-payment of arrears of rent are concerned it is provided under section 3 (2) that if the cultivating tenant pays or deposits or has paid or deposited, or is deemed to have paid or deposited under the Act, the whole of the current rent and if he applies, the authority may pass an order dismissing the suit or proceeding, in so far as such suit or proceeding relates to such recovery or eviction. The procedure contemplated for pending suit and proceeding is therefore that the cultivating tenant should pay the arrears of rent or should have paid or deposited or be deemed to have paid or deposited under the provisions of the Act, and apply to the Court or competent authority to pass an order dismissing the petition for recovery of rent or for eviction. It may be noted that section 3 (1) as well as (2) enables the cultivating tenant to pay the current rent within six months and get the arrears of rent discharged. The contention of the learned counsel that there is absolute stay of all the proceedings is based on section 5 which bars certain proceedings for eviction or recovery of arrears of rent. Section 5 of Act XXI of 1972 states as follows :

" (1) Until the expiration of a period of six months from the date of the publication of this Act,—

(a) No application shall be made for the eviction of a cultivating tenant for non-payment of any arrears of rent, and no suit shall be filed for the recovery of such arrears.

(b) No suit shall be filed for the eviction of a cultivating verumpattamdar for non-payment of any arrears of rent."

5. Under these two clauses in section 5 (1), there is absolute bar of proceedings for eviction or for recovery of arrears of rent within a period of six months from the date of the publication of the Act, *i.e.*, from 11th August, 1972. But, so far as the present case is concerned, it is admitted that it falls under section 5 (1) (c) which runs as follows:

"Subject to the provisions of sub-section (2) of section 3, all application for the eviction of a cultivating tenant for non-payment of any arrears of rent and all suits, proceedings in execution of decrees or orders and other proceedings, pending before a Court or competent authority for the recovery of any arrears of rent or for such eviction, shall stand stayed."

6. According to this sub-section there will be stay of all applications for the eviction of a cultivating tenant for non-payment of any arrears of rent and all suits or proceedings in execution of decrees or orders, pending before a Court for the recovery of any arrears of rent or for eviction. These proceedings will be stayed subject to the provisions of sub-section (2) to section 3. Thus in a case like the present one, when an application for eviction of a cultivating tenant is pending, it is open to the tenant to take advantage of section 3 (2). If the case falls under section 3 (2) there is no absolute stay under section 5 (1) (c) as section 5 (1) (c) is subject to the provisions of sub-section (2) of section 3. Sub-section (2) of section 3 enables the tenant in a suit or proceeding pending on the date of the publication of the Act, *i.e.*, on 11th August, 1972, for recovery of arrears of rent or for eviction of the cultivating tenant, to pay or deposit or to make a deposit which is deemed to be a deposit under the Act, the whole of the current rent and to apply for dismissal of the petition. In this case, the petition for eviction was filed on 7th August, 1972 and after the Act came into force, the matter was taken upon 21st August, 1972 and as the tenant had not paid the money as required or made his appearance, the Court directed delivery of possession which was taken by the landowner.

7. A reading of section 5 (1) (c) along with section 3 (2) makes it clear that while all applications and all suits or proceedings are stayed for a period of six months from the date of the publication, the tenant under section 3 (2) is enabled to pursue his remedies for paying the current rent and getting his arrears of rent wiped out. Apart from the proceedings contemplated under section 3 (2), all other applications and proceedings are stayed. That means no further proceedings like execution of the decree for obtaining possession etc., could be taken by the landlord. Therefore the order of the Court below in the execution petition filed by the landowner on 7th August, 1972 ordering delivery of possession on 21st August, 1972 is contrary to the statutory stay provided for under section 5 (1) (c) of Act XXI of 1972.

8. Having found that possession which was delivered after 11th August, 1972 when Act XXI of 1972 came into force, namely, on 23rd August, 1972 is contrary to section 5 (1) (c), the question arises whether the tenant can get back possession which was taken away from him. Two petitions were filed by the tenant, one on 7th September, 1972 and another on 6th October, 1972, the former under section 4 (2) and (5) of Act XXV of 1955, and the latter under section 7 of Act XXI of 1972. The lower Court ordered both the petitions and directed re-delivery of possession to the tenant. The present civil revision petition is filed by the landowner against that common order.

9. The point that arises for consideration is whether the order of re-delivery passed by the lower Court is sustainable in law. So far as the right of the Court to direct re-delivery under section 7 of Act XXI of 1972 is concerned, that section limits the power of re-delivery only to cultivating tenants who have been evicted from any land on or after the 1st March, 1972 and before the date of the publica-

tion of Act XXI of 1972, that is 11th August, 1972. The dispossession in this case being on 23rd August, 1972 this section will not be applicable and therefore the petition under this section will have to be dismissed.

10. The petition under sections 4 (1) and (5) of Act XXV of 1955 has to be dealt with. Section 4 (1) of that Act provides that every cultivating tenant who was in possession of any land on 1st December, 1953 and who is not in possession thereof at the commencement of that Act, this is on 24th September, 1955, will be entitled to be restored to such possession. This sub-section is not applicable as dispossession was not during the relevant period contemplated under this section. The only provision therefore left for the tenant is section 4 (5) of Act XXV of 1955, which provides as follows :

> "Any cultivating tenant who after the commencement of this Act has been evicted except under the provisions of sub-section (4) of section 3 shall be entitled to apply to the Revenue Divisional Officer within two months from the date of such eviction or within two months from the coming into force of the Madras Cultivating Tenants' Protection (Amendment) Act, 1956, for the restoration to him of the possession of the lands from which he was evicted and to hold them with all the rights and subject to all the liabilities of a cultivating tenant".

The benefit of being restored to possession is available to persons who have been dispossessed except under the provisions of sub-section (4) of section 3. It is not denied that the tenant was dispossessed under section 3 (4). The landowner applied for eviction of the tenant on the ground of non-payment of rent and the order of eviction became final. The contention for the tenant is that though the order became final, the order directing delivery of possession was made on 21st August, 1972 when there was a statutory stay of proceedings in execution under section 5 (1) (*c*) of the Act and that therefore the eviction order is not in accordance with section 3 (4) of Act XXV of 1955. It cannot be disputed that the order of eviction was strictly according to section 3 (4). The remedy provided under section 4 (5) is that the tenant would be entitled to redelivery of possession if he had been evicted except under the provisions of section 3 (4). As already stated, the order of eviction was under section 3 (4). but dispossession was not in accordance with section 5 (1) (*c*) of Act XXI of 1972. It does not appear that the section contemplated cases of persons who would be dispossessed contrary to the provisions of section 5 (1) (*c*). There is no breach of the order of eviction under section 3 (4). It is submitted by the learned counsel for the tenant that as possession was granted contrary to section 5 (1) (*c*), the order of delivery of possession should be treated as *non est* and the tenant should be put back in possession. It is not possible to treat the order as *non est* for in pursuance of the order, the landowner was put in possession and she is in fact in possession. There are no provisions in the Act which would enable the tenant to get back possession. It is not possible to accept the tenant's contention that section 4 (5) of Act XXV of 1955 would give him such a remedy. Unless such a remedy is specifically provided for in the enactment, the tenant cannot have any remedy.

11. Finally, the learned counsel for the tenant submitted that as per section 6-BB of Act XXV of 1955, which was introduced by Act VI of 1974, this Court has ample powers to restore possession to the tenant. That section provides that where any cultivating tenant has been evicted in execution of an order for eviction passed under sub-section (4) of section 3, and where such order of eviction is set aside in revision by the High Court, the High Court shall direct restoration to such cultivating tenant of the possession of lands from which he was evicted. In this case, the cultivating tenant was evicted in execution of an order passed under sub-section (4) of section 3. The order of eviction has not been set aside by the High Court. In fact, the order of eviction was confirmed by the High Court in prior proceedings. The finding that delivery of possession is contrary to the statutory stay under section 5 (1) (*c*) of Act XXI of 1972 would not bring the case under section 6-BB of Act XXV of 1955 and the power of revision cannot be exercised by

this Court to direct delivery of possession by the landowner.

12. The result is, the landowner's petition for revising the order of the lower Court is allowed and she is directed to be put back in possession by the tenant. Time for delivery of possession is three months from this date. There will be no order as to costs.

S.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT : – *T. Ramaprasada Rao, J.*

A. Muthukumaraswamy .. *Petitioner**

v.

A. Devaraj .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 10 (3) (c) —Petition for eviction—Additional accommodation—Accommodation required for school run by members of the landlord's family—Whether falls within the scope of section 10 (3) (c)—Held landlord in section 10 (3) (c) does not include any member of his family.

It cannot be said that when the Legislature did amend section 10 (3) (*a*) (iii) of Act XVIII of 1960 it was not aware of the need to expand the word "landlord" appearing in section 10 (3) (*c*). This deliberate avoidance on the part of the Legislature appears to be significant and therefore, it would not be within the canons of propriety, if the expression "landlord" appearing in section 10 (3) (*c*) should be liberally interpreted notwithstanding the deliberateness on the part of the Legislature not to make it elastic or not to expand it at all. [*Para.* 3.]

Therefore, under section 10 (3) (*c*) the landlord could seek for additional accommodation only for the purpose of a business which he was carrying on and it would be difficult to accept that the landlord's wife's business or his daughter's business would also be covered by the expression "his business" in section 10 (3) (*c*) of the Act. [*Para.* 4.]

* C.R.P. No. 85 of 1975. *2nd April,* 1976.

Cases referred to :—

Saraswathi v. *Vadivelu Chettiar,* (1967) 2 M.L.J. 81 : 80 L.W. 408 ; *Kunju* v. *Ahmed Unnissa Begum,* (1963) 1 M.L.J. 87 : 76 L.W. 194 ; *Kolandavelu Chettiar* v. *Koolayana Chettiar,* (1961) 1 M.L.J. 184 : 74 L.W. 164.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act XXIII of 1973 praying the High Court to revise the order of the Court of the 2nd Judge, Court of Small Causes, Madras, dated 9th April, 1974 and made in H.R.A. No. 703 of 1973 (H.R.C. No. 1579 of 1972, Rent Controller, VI Judge, Court of Small Causes, Madras).

O.K. Nambiar, for Petitioner.

W. S. Venkataramanjulu, for Respondent.

The Court made the following

ORDER.—The landlord, who lost before the Rent Control Appellate Authority, in the matter of eviction of the tenant-respondent in an application filed under section 10 (3) (*c*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 on the ground that he needed additional accommodation, has come up to this Court. The landlord's case is that the respondent is a tenant under the petitioner occupying two shops in the ground floor of premises No. 75, Harris Road, Madras-2, and is carrying on a non-residential activity. The landlord is residing in the same premises with his family and the members of his family are running an English Medium School known as Saraswathi Nursery School in the same premises and the accommodation for running the said school is not sufficient for them and, therefore, he requires the two shops in the occupation of the tenant for the benefit of his family members. The petitioner would say that the respondent has constructed a two storeyed building in the same road and it would not be inconvenient for him to shift his spare parts shops to his new premises. As the tenant-respondent failed to vacate in spite of notice, and as the accommodation provided to the school run by the members of the family of the landlord is not sufficient, the present petition was filed for eviction of the tenant. The respondent-tenant

denied the landlord's case and opposed the application. It is brought out in the evidence that the petitioner is not actually running the Nursery School, but it is being run by his wife and daughter. The Rent Controller found that the claim of the landlord was *bona fide* and that no hardship would be caused to the tenant by his vacating the premises, inasmuch as he could easily shift his business to his own building in the same road. He would not agree with the legal objection raised by the tenant that as the petitioner-landlord was not carrying on a non-residential activity in the premises, he is not entitled to additional accommodation in the same building under section 10 (3) (*c*) of the Act. The Rent Controller directed eviction. On appeal, the Appellate Authority reversed the same. The appellate Court's view was that section 10 (3) (*c*) of the Act cannot enable a landlord to seek for additional accommodation for the purpose of a business which he is not carrying on. Relying upon the clear distinction made in the language used in section 10 (3) (*c*) of the Act, and section 10(3) (*a*) (iii) the Appellate Authority held that the petition for eviction was not maintainable and he allowed the appeal. It is as against this, the present civil revision petition has been filed.

2. Mr. O. K. Nambiar, learned counsel for the landlord relied upon a decision of our Court in *Saraswathi* v. *Vadivelu Chettiar*[1], and would urge that a commercial activity of a dependant of the landlord can also be taken advantage of for the purpose of eviction under section 10 (3) (*c*) of the Act for securing additional accommodation in the same premises resulting in the eviction of a tenant in charge of such accommodation. But Mr. W. S. Venkataramanjulu, learned counsel for the tenant would distinguish the cited report on the ground that that was a case decided under section 10 (3) (*a*) (iii) of the Act and not under section 10 (3) (*c*) of the Act. The question for consideration is, whether in an application for eviction under section 10 (3) (*c*) of the Act, the landlord can seek for eviction of the tenant in the same premises on the ground he wants additional accommodation of that portion occupied by the tenant for the purpose of expanding the commercial activity indulged in by his dependants.

3. Ever since the Act to regulate the letting of residential and non-residential buildings was passed by our State Legislature in order to prevent unreasonable eviction of tenants therefrom, there was a provision enabling the landlord to apply to the Controller for an order directing the tenant to put the landlord in possession of the buildings, if he is occupying only a part of a building whether residential or non-residential and request the Controller to direct the tenant occupying the whole or any portion of the remaining part of the building to put the landlord in possession thereof, if he requires additional accommodation for residential purposes or for purposes of a business which he is carrying on, as the case may be. There was also contemporaneously another provision which would enable a landlord for a similar order for eviction, when he is not in occupation of a residential building of his own or a non-residential building belonging to him. We shall consider these provisions in detail later. But the point is that ever since the special Act to prevent unreasonable eviction of tenants was introduced in 1949, a distinction was maintained between the provisions whereby a landlord would ask for additional accommodation from a tenant in the same premises from the provision whereunder a landlord could ask for a building in the occupation of his tenant, if he is himself not occupying a building of his own whether residential or non-residential in the same city, town or village. This distinction which has been maintained throughout by the Legislature has to be borne in mind, not only to understand the significance of such a definite classification, but also in the matter of the invocation of those sections for directing the eviction of tenants. In the 1949 Act (XXV of 1949), section 7 (3) (*a*) (iii) enabled the landlord to seek for eviction from a non-residential building of his tenant, if the landlord did not occupy for purposes of a business which he was carrying on, a non-residential building in the city, town or village concerned which is his own or to the possession of which he is entitled. At some point of time later, the landlord

1. (1967) 2 M.L.J. 81 : 80 L.W. 408.

under a similar provision under Act XVIII of 1960, could seek eviction, if the non-residential building is required by him or by his son. Again, this provision was amended in 1973, which entitled the landlord under such circumstances to ask for the premises for his own occupation or for the benefit of any member of his family, for the purpose of the business which he or any member of his family is carrying on. In the wake of these provisions, a decision rendered by our Court by Veeraswami, J., as he then was, was referred to by Mr. Nambiar before me in *Kangu* v. *Ahmed Unnissa Begum*[1]. The learned Judge was dealing with a case of eviction under section 7 (3) (*c*) of the 1949 Act. That clause read :

> " A landlord who is occupying a part of a building, whether residential or non-residential, may notwithstanding anything contained in clause (*a*) apply to the Controller for an order directing any tenant occupying the whole or any portion of the remaining part of the building to put the landlord in possession thereof, if he requires additional accommodation for residential purposes or for the purposes of a business which he is carrying on, as the case may be."

Sub-clause (i) of clause (*a*) of sub-section (3) of section 7 of the Act of 1949, pertained to the ground of requirement of the premises for owner's occupation under which a tenant in a residential building may be evicted therefrom provided the other conditions of the clause are satisfied. After noting the distinction between the words used in both the above clauses and in particular, interpreting the expression "for his own occupation", the learned Judge observed as follows :

> "The words 'if he requires' occurring in section 7 (3) (*c*) of the Madras Buildings (Lease and Rent Control) Act, 1949, should be understood in the same liberal sense as the words 'his own occupation' in section 7 (3) (*a*) of the Act have been understood. What is meant by the words 'his own occupation' or 'if he requires' is that the requirement is not that of a stranger. It is not necessary to attract those words that the need should be personal to the landlord. The need of close relations who happen to live with the landlord or land-lady may well satisfy the words 'his own occupation' or 'if he requires'. Dependency, social customs and habits, usage, practice of a particular community and like considerations may well be taken into account in determining whether the requirement of those words is satisfied."

In fact, he relied upon a similar decision of our Court in *Kolandavelu Chettiar* v. *Koolayana Chettiar*[1]. In *Saraswathi* v. *Vadivelu Chettiar*[2], this Court interpreted the word 'landlord' in section 10 (3) (*a*) (iii) of Act XVIII of 1960, as a word, which cannot be treated as rigid or inelastic. By that time, the 1949 Act, was amended and the provision of section 10 (3) (*a*) (iii) of Act XVIII of 1960, enabled the landlord or his son to apply for relief and for eviction of the tenant, if either of them was not occupying for purposes of a business which he or his son is carrying on a non-residential building in the city, which is his own. The improvement, if such an expression could be used, is that the Legislature added the alternative expression landlord or his son in the Act of 1960, whereas in the Act of 1949, it left the entitlement only to the landlord. In *Saraswathi* v. *Vadivelu Chettiar*[2], this Court, having regard to the expansion of the word "landlord" took a liberal view of the matter and said the mere addition of the word "son" after the word "landlord" in the section and the exclusion of the enumeration of other dependants or relatives cannot lead to the conclusion that the Legislature by necessary implication intended to exclude such dependants from obtaining the benefit of that provision. Here again a reference was made to the decisions in *Kolandavelu Chettiar* v. *Koolayana Chettiar*[1] and *Kangu* v. *Ahmed Unnissa Begum*[3]. After the decision in *Saraswathi* v. *Vadivelu Chettiar*[2], the section was amended in 1973 by Act XXIII of 1973. There, in section 10 (3) (*a*) (iii)

1. (1963) 1 M.L.J. 87 : 76 L.W. 194.

1. (1961) 1 M.L.J. 184 : 74 L.W. 164.
2. (1967) 2 M.L.J. 81 : 80 L.W. 408.
3. (1963) 1 M.L.J. 87 : 76 L.W 194.

with which we are concerned, for the words, "his son", the words "any member of his family" were substituted. Apparently, the Legislature was taking note of the interpretation given by the Courts to the expression "landlord" or "landlord or his son" which occurred in the Act of 1949 and in the Act of 1960. By 1973, therefore, in section 10 (3) (*a*) (iii) we have the provision whereby, in case it is a common non-residential building, if the landlord or any member of his family is not occupying for purposes of a business which he or any member of his family is carrying on a non-residential building in the city, town or village concerned, which is his own, then he can apply for eviction of the tenant in the occupation of his building provided the other conditions in the section are satisfied. Whilst this is the position, the Legislature did not think it fit at all to make such a concurrent and simultaneous amendment to section 7 (3) (*a*) of the Act, 1949, or section 10 (3) (*c*) of the Act of 1960, the language of the relevant section enabling the landlord to secure additional accommodation remained practically the same. At this stage, it is convenient to quote it for the purpose of ready reference. Section 10 (3) (*c*) which is equal to section 7 (3) (*c*) of the 1949 Act reads as under:

> "A landlord, who is occupying only a part of a building, whether residential or non-residential, may, notwithstanding anything contained in clause (*a*), apply to the Controller for an order directing any tenant occupying the whole or any portion of the remaining part of the building to put the landlord in possession thereof if he requires additional accommodation for residential purposes or for purposes of a business which he is carrying on, as the case may be."

If, therefore, the Legislature maintained the text of this part of section 10 of the new Act and section 7 of the old Act without expanding the meaning of the word, landlord, as they did to the same word appearing in section 10 (3) (*a*) (iii) then it should be assumed that the Legislature deliberately did not want to make the word "landlord" in section 10 (3) (*c*) an elastic expression which could take into its fold not only the landlord but also any member of his family. It is no doubt true that in *Kolandavelu Chettiar* v. *Koolayana Chettiar*[1], *Kangu* v. *Ahmed Unnissa Begum*[2] and *Saraswathi* v. *Vadivelu Chettiar*[3] the Court, on the basis of the norms and standards of an Indian society, expanded the meaning of the word "landlord" which was afterwards accepted by the Legislature as well. But it cannot be said that when the Legislature did amend section 10 (3) (*a*) (iii), it was not aware of the need to expand the word "landlord" appearing in section 10 (3) (*c*); the Legislature twice had an opportunity to consider this aspect. They would only amend section 10 (3) (*a*) (iii), but would not touch upon the language of section 10 (3) (*c*). This deliberate avoidance on the part of the Legislature appears to be significant and therefore, it would not be within the canons of propriety, if the expression "landlord" appearing in section 10 (3) (*c*) should be liberally interpreted notwithstanding the deliberateness on the part of the Legislature not to make it elastic or not to expand it at all, though it had two such opportunities to do so.

4. If, therefore, under section 10 (3) (*c*), the landlord could seek for additional accommodation only for the purpose of a business which he is carrying on, then it would be difficult to accept Mr. O. K. Nambiar's argument that the landlord's wife's business or his daughter's business would also be covered by the expression "his business" in section 10 (3) (*c*) of the Act. The petitioner-landlord cannot, on the ground that the accommodation with the tenant is required for expanding a Nursery School conducted by his wife and daughter, ask for such accommodation under section 10 (3) (*c*) of the Act and seek for eviction of the tenant. The order of the appellate Court is right.

5. The civil revision petition is dismissed but there will be no order as to costs.

S.J. *Petition dismissed.*

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1. (1961) 1 M.L.J. 184 : 74 L.W. 164.
2. (1963) 1 M.L.J. 87 : 76 L.W. 194.
3. (1967) 2 M.L.J. 81 : 80 L.W. 408.

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P.S. Kailasam, CJ., G. Ramanujam and V. Balasubrahmanyan, JJ.*

The Deputy Commissioner (C.T.), Coimbatore Division, Coimbatore .. *Petitioner**

v.

Vasantha Mills Limited, Singanallur Coimbatore .. *Respondents*

Central Sales Tax Act (LXXIV of 1956), section 5—Scope and Applicability—Sale occasioning export—Meaning.

Under section 5 of the Central Sales Tax Act there can be only one sale which occasions an export and if the local sellers have no concern with the actual export of the goods under the terms of their contract, the mere fact that they had shipped the goods in pursuance of a term of the contract of sale will not make their transaction of sale an integrated transaction with the export. Though the earlier view was that more than one sale could occasion export if they are so inter-connected as to form an integrated transaction, the latest view of the Supreme Court is that there can be only one sale which can occasion the export and that the sale can only be with a foreign buyer. [*Para.* 7.]

On the principles laid down by the Supreme Court, there is no question of two sales coming within the scope of section 5 (1) and it is only an export sale *i.e.*, a sale between an exporter and the foreign buyer that will come under the definition of sale in the course of export and all other sales even if inter-connected or integrated with the export cannot be treated as sales in the course of export. There being no room for two or more sales being in the course of export and the only sale which can be said to occasion the export being the sale which itself results in the movements of the goods from the exporter to the importer, the theory of integrated activity cannot any longer be invoked to make the sale between the local dealers a sale in course of export. [*Para.* 12.]

* T.C. No. 411 of 1970. *26th April*, 1976.

Cases referred to :

Mohammad Sirajudeen v. *State of Orissa*, (1975) 36 S.T.C. 136: (1975) 2 S.C.C. 47: A.I.R. 1975 S.C. 1564; *State of Tamil Nadu* v. *Cauveri Spinning and Weaving Mills Limited*, (1974) 33 S.T.C. 506; *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory*, (1953) 4 S.T.C. 205: (1953) 2 M.L.J. 123: 1954 S.C.R. 53: 1953 S.C.J. 471: A.I.R. 1953 S.C. 333; *Ben Gorm Nilgiri Plantations Company* v. *Sales-tax Officer*, (1964) 15 S.T.C. 753: (1964) 2 S.C.J. 693: (1964) 7 S.C.R. 706: A.I.R. 1964 S.C. 1752; *Binani Brothers (P.) Ltd.* v. *Union of India*, (1974) 33 S.T.C. 254: (1974) Tax.L.R. 1999: (1974) 1 S.C.C. 459: A.I.R. 1974 S.C. 1510.

Petition under section 38 of Tamil Nadu General Sales Tax Act, 1959, praying the High Court to revise the order of the Sales Tax Appellate Tribunal (A.P.), Coimbatore, dated 5th June, 1970 and made in C.T.A. No. 832 of 1968 (Appeal No. 274 of 1968, Appellate Assistant Commissioner (C.T.), Pollachi) (M.G.S.T. No. 10655 of 1966-67—Joint Commercial Tax Officer, Singanallur Division, Coimbatore).

The Additional Government Pleader No. 1, on behalf of Petitioner.

N. Srinivasan, for Respondent.

The Order of the Court was pronounced by

Ramanujam, J.—This matter has come before the Full Bench on an order of reference made by V. Ramaswami and Sethuraman, JJ., as they had felt that the correctness of the decision of the Division Bench in *State of Tamil Nadu* v. *Cauveri Spinning and Weaving Mills Limited*[1], is open to doubt in view of the later decision of the Supreme Court in *Mohammad Sirajudeen* v. *State of Orissa*[2].

2. The assessee in this case is a dealer in cotton and cotton yarn. For the assessment year 1966-67 it had reported a total turnover of Rs. 2,83,45,614.33 and out of the total turnover, a sum of Rs. 1,23,362.40 was claimed to represent sales of cotton

1. (1974) 33 S.T.C. 506.
2. (1975) 36 S.T.C. 136 : (1975) 2 S.C.C. 47 : A.I.R. 1975 S.C. 1564.

yarn in the course of export. This claim was not accepted by the assessing authority who held that the said turnover represented intra-State sales. On appeal, the appellate Assistant Commissioner also upheld the view of the assessing authority. On a further appeal to the Sales tax Appellate Tribunal, it was held that the said disputed turnover of Rs. 1,23,362.40 represented export sales and as such it should be excluded from the taxable turnover. The State Government had challenged the decision of the Tribunal in this tax case.

3. Reliance was placed by the State on the decision of the Supreme Court in *Mohammad Sirajudeen* v. *State of Orissa*[1], in support of its stand that the transactions in question cannot be treated either as export sales or as sales in the course of export. The assessee, however, relied on the decision of a Division Bench of this Court in *State of Tamil Nadu* v. *Cauveri Spinning and Weaving Mills Limited*[2], to which one of us was a party, wherein similar transactions of sale have been held to be sales in the course of export. V. Ramaswami and Sethuraman, JJ., who heard this tax case in the first instance felt that in view of the later decision of the Supreme Court in *Mohammad Sirajudeen* v. *State of Orissa*[1], the earlier Bench decision of this Court in *State of Tamil Nadu* v. *Cauveri Spinning and Weaving Mills Limited*[2] may not be correct and, therefore, referred the matter to a Full Bench.

4. The nature of the transactions in this case as has been found by the Tribunal is as follows: The assessee Mills sold cotton yarn to a local dealer, M/s. Keshavlal Thalakchand and Company (Private) Limited, Madras, hereinafter referred as the "local purchaser". These are first sales of cotton in the State of Tamil Nadu taxable at the hands of the Mills at single point. The purchaser-company has in its turn effected sales of yarn it had purchased from the Mills to certain purchasers in Colombo. The sales between the assessee Mills and the local purchaser were on f.o.b. terms, and the yarn purchased were earmarked for export only. The assessee Mills have to despatch the yarn directly to the purchasers at Colombo though such despatch was to be on account and risk of the local purchaser. The relevant bills of lading show that the assessee Mills had actually shipped the goods in the Port of Tuticorin, though the name of the local purchaser had been shown therein as the exporter. On these facts the assessing as well as the appellate authorities held that there are two distinct transactions of sale, one by the assessee Mills to the local purchaser and the other by the local purchaser to the National Textile Corporation, Colombo, that the former sale having nothing to do with export is an intra-State sale and that the latter sale alone is a sale in the course of export. The Tribunal, however, held on the same facts that though in the bill of lading the name of the local purchaser is mentioned as exporters the goods having been shipped by the assessee, it should be taken as an exporter as it had actually shipped the goods and as the A.R.No. 4 forms are in its name. Thus the only ground on which the Tribunal held the sales effected by the assessee to the local purchaser to be export sales is that the assessee has exported the goods in pursuance of its sale to the local purchaser. The question, therefore, is whether the said ground relied on by the Tribunal for holding the assessee's sales to be export sales could be sustained.

5. The learned counsel for the Revenue submits that, in view of the recent decision of the Supreme Court in *Mohammad Sirajudeen* v. *State of Orissa*[1], the sales in question cannot be treated either as export sales or as sales in the course of export. In the case before the Supreme Court, the assessee had entered into two contracts with the State Trading Corporation for the sale of mineral one. The Corporation in its turn entered into contracts with foreign buyers for the sale of the identical goods purchased from the assessee. The terms of contract between the assessee and the Corporation were as follows: The price expressed in U.S. dollars for long ton is to be f.o.b., Calcutta. The goods should be ready in Calcutta harbour for shipment by a particular steamer.

1. (1975) 36 S.T.C. 136 : (1975) 2 S.C.C. 47 : A.I.R. 1975 S.C. 1564.
2. (1974) 33 S.T.C. 506.

1. (1975) 2 S.C.C. 47: (1975) 36 S.T.C. 136: A.I.R. 1975 S.C. 1564.

The final sampling and moisture determination and the final ascertainment of weight and price should be done at the foreign port of discharge by certain named persons, and their certificate is to be final and binding on both the buyer and the seller. 90 per cent. payment is to be made against shipping documents. The Corporation will assign the relevant foreign letter of credit which is to be opened in its name by the foreign buyer. The Corporation is to endorse the bill of lading and deliver it to the assessee. The balance is to be paid after the destinational weight and analysis on the basis of the terms mentioned in the corresponding sale contract with foreign buyers. It was claimed by the assessee in that case in proceedings under the Central Sales Tax Act, 1956, that his sales of mineral ore to the State Trading Corporation were sales in the course of export and, therefore, exempted from tax under section 5 of that Act. The High Court had held that the sales were liable to tax. When the matter was taken to the Supreme Court it was urged that the assessee originally entered into negotiations with foreign purchasers and settled all the conditions of contract, that it is only thereafter the Corporation entered into f.o.b. contracts with the assessee, and with the foreign buyer on identical terms, that all the necessary steps including the payment of customs duty for shipment and export had been taken by the assessee, that the Corporation could not have diverted the goods to a buyer in India without violating the export and import control order, that the contract between the assessee and the Corporation being on f.o.b. basis the property in the goods passed only on shipment when the goods were in the stream of export, that having regard to the necessity of entering into contracts with foreign buyers through the channel of the Corporation, the rigid rule of privity of contract should be relaxed on considerations of equity and justice and that the presumption of the Corporation being an agent of the assessee in the export of mineral ore should be raised especially when the Corporation is interested only in the commission of one dollar per long ton from the assessee. The assessee also claimed that his sale to the State Trading Corporation constituted one, integrated transaction resulting in the ultimate export of the goods and, therefore, it should be treated as a sale in the course of export. It was held by a majority, after considering the relative scope of Article 286 (1) (*b*) of the Constitution and section 5 of the Central Sales Tax Act with reference to almost all the earlier decisions rendered by the Supreme Court, that the assessee was not entitled to claim exemption under section 5 (1) of the Central Sales Tax Act in relation to the said contracts. The main reasons given by the majority for taking that view are: (1) The mention of f.o.b. price in the contracts between the assessee and the Corporation does not render them f.o.b. contracts with the foreign buyer. (2) The Corporation had entered into independent contracts with the foreign buyers on f.o.b. basis which alone occasioned the export of the goods. (3) The Corporation having purchased the goods from the assessee in order to fulfil its contract with the foreign buyer, the assessee's contract with the Corporation is not the direct cause for nor has it occasioned the export. (4) Though the assessee had been required under the contract entered into with the Corporation to bring the goods to a named ship his sale cannot be said to have caused the export and the export was actually the result of the sale by the Corporation to the foreign buyer. (5) From the mere carrying out the directions given by the Corporation to the assessee to place the goods on board the ship as a term of the contract of sale, the assessee cannot be taken to be an exporter and (6) The fact that exports can be made only through the State Trading Corporation and that, the State Trading Corporation is interested in getting only a commission does not have the effect of making the assessee an exporter when there is direct export contract only with the Corporation and the foreign buyer.

6. Khanna, J., had dissented and had taken the view that as the goods of the assessee had been sold on f.o.b. basis without any chance of the goods being diverted, his sale should be taken to be interlinked with the export as to form an integrated transaction, that the position of the State Trading Corporation under its contract with the assessee was not that

of a purchaser in the ordinary sense of the term, that the introduction of a statutory intermediary like the State Trading Corporation which is entitled only to a commission would not affect the real nature of the transaction, that it was the assessee who was to export the goods to the foreign buyer through the State Trading Corporation, a statutory intermediary, because of the legal requirements under the Export Control Order, that there is nothing in section 5 of the Central Sales Tax Act to restrict the exemption from payment of tax to only one sale, that the use of the word singular in section 5 and not in plural would not make much material difference in view of section 13 of the General Clauses Act, and that there is nothing in law to rule out two or more sales qualifying for exemption if the sales are so interlinked with the export of the goods so as to form one integrated transaction.

7. Though the minority view of Khanna, J., purports to follow the earlier decisions of the Supreme Court on the point, the majority has, after explaining the earlier decisions, struck a different note and according to them, it is only the sale between the exporter and the foreign buyer, which has a direct nexus with the export, that can be said to occasion the export. Under section 5 of the Central Sales Tax Act there can be only one sale which occasions an export and if the local sellers have no concern with the actual export of the goods under the terms of their contract, the mere fact that they had shipped the goods in pursuance of a term of the contract of sale will not make their transaction of sale an integrated transaction with the export. Though the earlier view was that more than one sale could occasion export if they are so interconnected as to form an integrated transaction, the latest view of the Supreme Court in the above case is that there can be only one sale which can occasion the export and that sale can only be with a foreign buyer.

8. It is urged by the Revenue that in the face of the above decision of the Supreme Court, the decision of this Court in *State of Tamil Nadu* v. *Cauvery Spinning and Weaving Mills Limited*[1], cannot be accepted as laying down the correct position, that it is no longer necessary to go into the question as to whether a sale between two local dealers is interconnected with the export, that even if there is an inter-connection or an integration with the export, still under the definition of sale in the course of export, it cannot be taken to have been a cause or occasion for the export. It is also said that the decision in *State of Tamil Nadu* v. *Cauvery Spinning and Weaving Mills Limited*[1] is in accord only with the said minority view.

9. In *State of Tamil Nadu* v. *Cauvery Spinning and Weaving Mills Limited*[1], the assessee, a spinning and weaving mill entered into contracts of sale of cotton yarn with a buyer at Madras who had in turn contracted to sell the same to a buyer in Ceylon. The sales were on f.o.b. terms. Under the contract the assessee should put the goods free on board and payments should be made against delivery of documents. The bill of lading showed the assessee as consignor and the foreign buyer or his nominee in Ceylon as consignee. The goods were released under A.R. No. 4 forms without payment of Central Excise Duty as they had been earmarked for export. On those facts, a Division Bench held that the contracts did not make the assessee an agent for the purpose of export, that the property in the goods sold passed only on delivery of the documents after the goods joined the export stream, that the sales by the assessee and the export of the goods were so inter-connected as to justify the inference that the sale and the export were integrally connected and that, therefore, the transactions were sales in the course of export.

10. This decision runs counter to the decision of the Supreme Court in *Mohammad Sirajudeen* v. *State of Orissa*[2], holding that the shipment of the goods at the instance of the exporter in pursuance of the terms of the contract between him and the exporter cannot make the local seller an exporter, that whatever be the

1. (1974) 33 S.T.C. 506.
2. (1975) 2 S.C.C. 47 : (1975) 36 S.T.C. 136 : A.I.R. 1975 S.C. 1564.

connection between the local sale and the export sale and however much they are integrated with the actual export, it is only the sale between the exporter and the foreign buyer which can occasion the export of the goods, that a transaction of sale between the local seller and the exporter can never become a sale in the course of export, and that section 5 of the Central Sales Tax Act comprehends only one sale occasioning the export and that sale is the one between the local exporter and the overseas importer.

11. The learned counsel for the assessee contends that the earlier decisions of the Supreme Court in *State of Travancore Cochin* v. *Shanmuga Vilas Cashewnut Factory*[1]; *Ben Gorm Nilgiri Plantations Company* v. *Sales-tax Officer*[2]; and *Binani Brothers (Private) Limited* v. *Union of India*[3], have all laid down that not only an export sale between local exporter and the overseas importer, but also every sale so inter-connected as to form part of one integrated transaction, could be treated as a sale in the course of export, that those decisions have not been held to be incorrect in the latest decision of the Supreme Court and, therefore, that decision should be confined to the facts of that case alone. According to the learned counsel even after the said decision of the Supreme Court, the correct legal position is that in addition to the actual export sale, sales which form one integrated transaction with the export would also come under the definition of sale in the course of export under section 5 of the Central Sales Tax Act.

12. We are not inclined to agree with the counsel for the assessee that the said decision of the Supreme Court should be confined to the facts of that case. In fact the Supreme Court had referred to the earlier decisions on the point and had explained the same. We have therefore to take the latest decision of the Supreme Court as laying down the law on the point. May be there is much to be said in favour of the dissenting view set out by Khanna, J., in the light of the precedents, but this Court is bound by the decision as expounded by the majority view. On the principles laid down by the Supreme Court in the said case, there is no question of two sales coming within the scope of section 5 (1) and it is only an export sale *i.e.*, a sale between an exporter and the foreign buyer that will come under the definition of sale in the course of export, and all other sales even if inter-connected or integrated with the export cannot be treated as sales in the course of export. There being no room for two or more sales being in the course of export and the only sale which can be said to occasion the export being the sale which itself results in the movement of the goods from the exporter to the importer, the theory of integrated activity cannot any longer be invoked to make the sale between two local dealers a sale in the course of export. Therefore, the assessee in this case cannot succeed in his claim that the disputed sales are sales in the course of export.

13. The tax case, is, therefore allowed. There will, however, be no order as to costs.

R.S. ——— *Appeal allowed.*

[END OF VOLUME (1976) 2 M.L.J. REPORTS.]

1. (1953) 4 S.T.C. 205 : (1953) 2 M.L.J. 123 : 1954 S.C.R. 53 : 1953 S.C.J. 471 : A.I.R. 1953 S.C. 333.
2. (1964) 2 S.C.J. 693 : (1964) 7 S.C.R. 706 : (1964) 15 S.T.C. 753 : A.I.R. 1964 S.C. 1752.
3. (1974) Tax.L.R. 1959 : (1974) 1 S.C.C. 459 : (1974) 33 S.T.C. 254: A.I.R. 1974 S.C. 1510.

9. For the reasons stated above, we allow this appeal, set aside the judgment and order of the High Court passed in O.S. Appeal No. 64 of 1974 and dismiss Company Petition No. 85 of 1974 as being not maintainable. We shall direct the parties to bear their own costs throughout.

V.K. ——— *Appeal allowed.*

[END OF VOLUME (1976) 2 M.L.J. (S.C.)].